SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 4

CASCADE NATURAL GAS CORPORATION, APPELLANT,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

No. 5

PEOPLE OF THE STATE OF CALIFORNIA, APPELLANT,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

No. 24

SOUTHERN CALIFORNIA EDISON COMPANY, APPELLANT,

vs.

EL PASO NATURAL GAS COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

INDEX

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VOLUME 2

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Application for leave to intervene of Nevada Public Service Commission	334	445
Order that Paradox Production Corporation may have to and including November 20, 1964 to serve and file Memorandum	339	448
Notice (Rule 77(d)) mailed to counsel of record of order extending time, etc.	340	449
Memorandum of Utah Public Service Commission in support of application for leave to intervene	341	452
Statement of State of California in support of application for leave to intervene	349	458
Memorandum on motion to intervene by Northwest Natural Gas Company	355	461
Memorandum in support of intervention or amicus curiae by Paradox Production Corporation	360	464
Brief in support of amended application for leave to intervene of Washington Utilities and Transportation Commission	367	470
Memorandum in support of application for leave to intervene of State of Idaho, ex rel Idaho Public Utilities Commission	391	491
Memorandum of defendant El Paso Natural Gas Company in opposition to applications and motions to intervene	398	497
Memorandum in support of intervention of the State of Oregon Ex Rel Public Utility Commissioner of Oregon	417	513
Memorandum brief in support of the application of the Public Service Commission of Wyoming for leave to intervene and petition to amend its said application	438	531
Acknowledgment of receipt of Memorandum Brief of Public Service Commission of the State of Wyoming (omitted in printing)	452	544

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Transcript of proceedings of December 2, 1964 on proposals for divestiture and motions to intervene	454-1	544
Appearances	454-1	544
Statement by Mr. Sabin on behalf of Public Utility Commission of Oregon	454-7	549
Statement by Mr. Simpson on behalf of Washington Utilities and Transportation Commission	454-11	552
Statement by Mr. Dingle on behalf of Idaho Public Utilities Commission	454-13	553
Statement by Mr. Chapman on behalf of Washington Natural Gas Company	454-13	554
Statement by Mr. Roberts on behalf of Paradox Production Company	454-18	557
Statement by Mr. Jones on behalf of Mountain Fuel Supply	454-19	558
Statement by Mr. Bennett on behalf of The State of California	454-23	561
Statement by Mr. Hooper on behalf of Cascade Natural Gas Corporation	454-31	566
Statement by Mr. Tuttle on behalf of Public Utilities Commission of the State of California	454-33	568
Statement by Mr. Furbush on behalf of Pacific Gas and Electric Company	454-37	571
Testimony of Paul Kayser—		
(recalled)—		
direct	454-42	574
Offers in evidence	454-43	574
Voir dire Examination	454-49	579
Testimony of Paul Kayser—		
cross	454-50	580
Offer in evidence	454-77	600
Testimony of Howard Boyd—		
direct	454-101	616

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Transcript of proceedings, December 3, 1964	454-128	635
Testimony of Howard Boyd— (resumed)— direct	454-128	635
Offer in evidence	454-131	637
Testimony of Howard Boyd— cross	454-134	639
Offers in evidence	454-178	671
Testimony of Howard Boyd— cross	454-179	672
Alvin J. Rowe, Jr.— direct	454-194	683
Offer in evidence	454-199	686
Testimony of Howard Boyd— (recalled)— cross	454-205	691
Offer in evidence	454-230	709
Testimony of Howard Boyd— redirect	454-244	720
Transcript of proceedings, December 4, 1964	454-248	722
Testimony of Howard Boyd— (resumed)— cross	454-248	722
Offers in evidence	454-255	727
Opening statement by Mr. Lipson on behalf of the Government	454-275	741
Testimony of Howard Boyd— (resumed)— cross	454-290	751
Offers in evidence	454-296	755
Defendant, El Paso rests	454-305	761
Testimony of George F. Hess— direct	454-305	761
Offers in evidence	454-311	766
Colloquy between court and counsel	454-314	768

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Transcript of proceedings, December 4, 1964—Continued		
Testimony of George F. Hess—direct	454-325	775
Offers in evidence	454-325	776
Testimony of George F. Hess—cross	454-344	789
Transcript of proceedings, December 8, 1964	454-352	795
Appearances	454-352	795
Denial of applications for leave to intervene, etc.	454-353	796
Colloquy re offers in evidence	454-355	797
Offer in evidence	454-361	801
Testimony of Roy B. Riggs, Jr.—direct	454-361	801
Voir dire examination	454-366	805
Offer in evidence	454-381	815
Testimony of Roy B. Riggs, Jr.—direct (continued)	454-382	816
Colloquy between court and counsel	454-385	818
Testimony of Howard Boyd—(recalled)—further cross	454-396	825
redirect	454-397	826
Offer in evidence	454-398	827
Testimony of Howard Boyd—redirect	454-405	831
Offer in evidence	454-407	833
Testimony of Howard Boyd—recross	454-408	834
Defendant, El Paso rests	454-412	837
Transcript of proceedings, December 9, 1964	454-420	841
Argument by Mr. Harrison on behalf of El Paso	454-420	841
Argument by Mr. Lipson on behalf of Government	454-454	864
Further argument by Mr. Harrison on behalf of El Paso	454-504	896

	Original	Print
Record from the United States District Court for the District of Utah, Central Division—Continued		
Transcript of proceedings, December 10, 1964	454-508	899
Testimony of Roy B. Riggs, Jr.— (recalled)— direct	454-508	899
Proceedings in chambers	454-518	905
Testimony of Roy B. Riggs, Jr.— direct (continued)	454-525	909
Voir dire examination	454-540	922
Motion granted for Government to withdraw Government Exhibit 19 and to strike testimony of Roy B. Riggs, Jr.	454-578	949
Government rests	454-578	949
Testimony of A. M. Derrick, Jr.— direct	454-579	950
Colloquy	454-583	952
Argument by Mr. Harrison on behalf of El Paso	454-587	955
Argument by Mr. Lipson on behalf of Government	454-600	963
Further argument by Mr. Harrison on behalf of El Paso	454-634	985

[fol. 334]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants,

NEVADA PUBLIC SERVICE COMMISSION, Intervenor.

APPLICATION FOR LEAVE TO INTERVENE—
Filed November 19, 1964

Comes now the Nevada Public Service Commission, a legally constituted agency of the State of Nevada, by and through the Attorney General of Nevada, and respectfully applies for leave to intervene in this matter pursuant to the provisions of Rule 24 of the Federal Rules of Civil Procedure. This application is submitted as parens patriae on the following grounds and for the following reasons:

I

Applicant, under the laws of the State of Nevada and more specifically under the provisions of NRS 704.020, is charged with full power of supervision, regulation and control of public utilities operative within Nevada. Among those companies embraced within the definition of public utilities under Nevada law, is any company owning, operating or controlling any part of a plant or equipment within

[File endorsement omitted]

Nevada for the production, delivery or furnishing for or to other persons, firms, associations, or corporations, pri- [fol. 335] vate or municipal, gas for business, manufacturing, agricultural or household use. Specifically, inter alia, the Commission is charged with the duty of prescribing classifications of the service provided by public utilities and fixing and regulating the rates thereof.

II

Natural gas is distributed within the State of Nevada and the distribution thereof is subject to regulation by Applicant, being a public utility activity as defined by statutes of the State of Nevada, particularly NRS 704.020. During the calendar year 1963, approximately seventeen and one-half billion cubic feet of natural gas were distributed within Nevada and all of such gas was provided to Southwest Gas Corporation, a public utility subject to jurisdiction of this Commission, by El Paso Natural Gas Company in consideration of payments aggregating approximately Six Million Dollars ($6,000,000). It is of the highest order of importance to Nevada natural gas consumers that the interstate pipeline company, or companies, upon which such consumers must rely to satisfy their needs for gas supplies, be relieved of undue restraints or disabilities disrupting capacity of the pipeline, or pipelines, to provide such supplies in efficient and adequate manner.

III

On April 6, 1964, the United States Supreme Court directed that defendant El Paso Natural Gas Company be ordered to divest certain of its properties without delay. On October 19, 1964, such defendant presented to this Court a plan for such divestiture. Applicant has been supplied with, and has reviewed, such plan; it is apparent that if divestiture occurs in substantial adherence to that proposed under said plan, consumers of natural gas within the State of Nevada will in future be served with natural gas to be

delivered by defendant El Paso Natural Gas Company [fol. 336] along the Nevada southern border and along the northern border of the State by the "New Company" which must be created for the purpose of owning and operating properties to be divested. It is, therefore, clear that the prospective interest of Nevada natural gas consumers in efficient and reliable gas service compels assurance that both companies be strong and fully capable of supplying natural gas requirements of such consumers without hazard such service may be imperilled by needless uncertainties or delays of any appreciable duration.

IV

There is no other party to this matter which will adequately protect the interest of the people of Nevada and Applicant against those matters which will arise before this Court if intervention is granted to any of those seeking intervention herein.

V

No pleadings are submitted with this application for the reason that all issues raised by the pleadings herein have been resolved and Applicant does not seek to challenge the ruling of the Supreme Court.

Wherefore, Applicant prays for an order of this Court permitting Applicant to intervene in this proceeding and to participate therein as a party in intervention in such cause for the reasons hereinabove set forth if this Court should permit intervention by any party so petitioning this Court.

Respectfully submitted,

Harvey Dickerson, Attorney General of Nevada, Supreme Court Building, Carson City, Nevada.

[fol. 337] Affidavit of Service (omitted in printing).

[fol. 339]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

No. C 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants.

ORDER THAT PARADOX PRODUCTION CORPORATION MAY HAVE TO AND INCLUDING NOVEMBER 20, 1964 TO SERVE AND FILE MEMORANDUM—November 19, 1964

Upon application of the Paradox Production Corporation and good cause appearing therefor,

It Is Hereby Ordered that the Paradox Production Corporation may have to and including the 20th day of November, 1964, within which to serve and file its Memorandum in Support of Application for Leave to Intervene.

Dated this 19th day of November, 1964.

Willis W. Ritter, United States District Judge.

[File endorsement omitted]

[fol. 340]

UNITED STATES DISTRICT COURT

DISTRICT OF UTAH

SALT LAKE CITY, UTAH

November 19, 1964

NOTICE (RULE 77(D)) MAILED TO COUNSEL OF RECORD OF ORDER EXTENDING TIME, ETC.

To:

William T. Thurman, Esq., U. S. Attorney, 200 P. O. & Courthouse Bldg., SLC

Jack Louis Lipson, Esq., Dept. of Justice, Washington, D. C.

Van Cott, Bagley, Cornwall & McCarthy, 65 South Main, Salt Lake City, Utah

Arthur H. Dean, Esq., 48 Wall Street, New York, New York

Gregory A. Harrison, Esq., 111 Sutter Street, San Francisco, California

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William M. Bennett, Esq., Public Utilities Comm., State of California, San Francisco, California

Harold W. Pierce, Esq., 735 S. W. Morrison Street, Portland, Oregon

Rex J. Hanson, Esq., Kearns Bldg., Salt Lake City, Utah

Richard A. Solomon, General Counsel; Howard E. Wahrenbrock, Solicitor; Joel Yohalem, Attorney, Federal Power Commission, Washington, D. C.

Richard B. Hooper, Esq., Norton Bldg., Seattle 4, Washington

Gustin, Richards & Mattsson, 1107 Walker Bank Bldg., Salt Lake City, Utah

Roger J. Nichols, Esq., Box 3249, Terminal Annex, Los Angeles, California

John T. Murphy, Esq. & Richard E. Tuttle, Esq., Public Utilities Comm. of State of California, 5072 State Bldg., San Francisco, California

A. Fred Miller, Esq., Office of Attorney General, State of Wyoming, 210 Supreme Court Bldg., Cheyenne, Wyoming

Richard H. Peterson, Esq., 245 Market Street, San Francisco, California

Bryce E. Roe, Esq., Continental Bank Bldg., Salt Lake City, Utah

Marcus, Leggat & Marcus, 625 First National Bank Bldg., Boise, Idaho
Harvey Dickerson, Attorney General, Supreme Court Building, Carson City, Nevada

---

Re: C 143-57

UNITED STATES OF AMERICA

—vs.—

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORP.

Take Notice, in accordance with Rule 77(d) of the Federal Rules of Civil Procedure, you are hereby notified that:

Order allowing the Paradox Production Corp. to and including 11-20-64 within which to serve and file its Memorandum in Support of Application for Leave to Intervene

was signed by Honorable Willis W. Ritter on the 19th day of November, 1964, and entered in the Docket as of the 19th day of November, 1964.

Andrew John Brennan, Clerk, By: D. Scott, Deputy Clerk.

[fol. 341]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants,

UTAH PUBLIC SERVICE COMMISSION, Intervenor.

MEMORANDUM OF UTAH PUBLIC SERVICE COMMISSION IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE—Filed November 19, 1964

On November 19, 1964, the Public Service Commission of Utah, filed an Application for Leave to Intervene in the above-entitled matter pursuant to Rule 24 of the Federal Rules of Civil Procedure. The grounds upon which applicant believes it is entitled to intervene in this matter are that whatever the order of this court may be with respect to divestiture it is apparent that the new entity to be created will be the company that will supply natural gas to the distributors and people of the State of Utah; that El Paso Natural Gas Company does supply substantial quantities of natural gas to distributors in Utah; that a portion of El Paso Natural Gas Company's gas supply is procured from producers in Utah, with the possibility that an even greater portion will be taken from Utah in the future; that applicant is charged by law with the duty of

[File endorsement omitted]

regulating intrastate operations of natural gas companies in Utah and determining what are reasonable rates and practices for such companies; that on behalf of natural gas distributors, consumers, and the general public of the State of Utah, applicant has a direct interest in the divestiture [fol. 342] proceedings before this court in that it is vital to the public welfare of the State of Utah that the new entity to be created by said divestiture have competent management and sufficient capital and natural gas reserves to enable it to meet future natural gas requirements in the State of Utah at reasonable prices; that rates set for natural gas in the State of Utah by applicant may be affected by the management, capital structure and reserves of the new entity which will emerge from said divestiture proceedings.

In support of its application, applicant respectfully directs the court's attention to the language of Rule 24 (a) (2) of the Federal Rules of Civil Procedure:

> "(a) Upon timely application anyone may be permitted to intervene in an action: * * * * (2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; * * *".

It is the position of applicant that its interests are not being adequately represented in this matter. While the interests of the United States Department of Justice may parallel that of applicant up to a point, its obligation is to see to it that the provisions of the Clayton Act are complied with and that the new entity to be created by divestiture is competitive with other natural gas pipeline companies, whereas applicant is far more concerned with the effect of the divestiture upon the natural gas requirements of the people of the State of Utah. For this reason, applicant maintains that it is not adequately represented in this proceeding. It is not necessary that applicant makes a positive showing that representation is inadequate, but

only that it may be inadequate. Kozak v. Wells, 278 F (2) 104, 110.

There seems to be considerable divergence in the cases [fol. 343] as to the type of "interest" an applicant must show before being permitted to intervene as a matter of right. With respect to intervention by a governmental body, an article in 50 Yale Law Review 65, 69 has this to say:

> "The rules which have required a property interest as a basis for intervention have not been strictly applied to intervention by governmental bodies because the courts have recognized that a non-pecuniary interest may be as vital to a state as a possessory interest. The Realty case furnishes an example. * * *"

The Realty case referred to above (Securities and Exchange Commission v. United States Realty and Improvement Co., 310 U.S. 434) was a bankruptcy proceeding in which the bankrupt applied for an arrangement under Chapter XI of the Bankruptcy Act whereby it sought to modify certain unsecured obligations. The Securities and Exchange Commission is authorized to participate in proceedings under Chapter X of the Act, but there is no such provision under Chapter XI. The Commission sought to intervene under subsection (b) of Rule 24 of the Federal Rules of Civil Procedure. In permitting the Commission to intervene, the Court said:

> "If, as we have said, it was the duty of the court to dismiss the Chapter XI proceeding because its maintenance there would defeat the public interest in having any scheme of reorganization of respondent subjected to the scrutiny of the Commission, we think it plain that the Commission has a sufficient interest in the maintenance of its public duties to entitle it through intervention to prevent reorganizations, which should rightly be subjected to its scrutiny, from proceeding without it. * * *"

"The interest of the Commission does not differ from that of a liquidator under a state statutory [fol. 344] proceeding who may, in a proper case, intervene in an equity receivership in a federal court to relinquish its jurisdiction in favor of the state proceeding, Pennsylvania v. Williams (294 U.S. 176). Neither the liquidator nor the state has any personal, financial or pecuniary interest in the property in the custody of the federal court. Their only interest is, like that of the Commission, a public one, to maintain the state authority and to secure a liquidation in conformity to state policy. * * *"

In contrast to the above quoted case in which "permissive" intervention was sought under subsection (b) of Rule 24, the court's attention is directed to the following cases in which intervention was not allowed under subsection (a) of Rule 24, primarily on the basis that the petitioner's interest was too remote: Commonwealth Edison Company v. Allis Chalmers Manufacturing Company, 315 F (2) 564 (USCA 7); Philadelphia Electric Co. v. Westinghouse Electric Corporation, 308 F (2) 856 (USCA 3); Kelley v. Summers, 210 F (2) 665, 673 (USCA 10);

Applicant maintains that it will be bound by the divestiture order to be made by this court, as applicant will have no legal redress from said order which could adversely affect the interests of the people of Utah who are represented by applicant. While again there is diversity of opinion in the courts as to what the term "bound" means, the court's attention is directed to Kozak v. Wells, 278 F (2) 104 (USCA 8) in which the court said:

"These intervenors are not indispensable parties and it could be said, if they were denied intervention, that technically they would not be bound by a judgment against the plaintiffs. On the other hand, * * * we think that in a very real sense (the applicant inter-

venors) would be bound, since obviously such a [fol. 345] judgment' would determine the legal effectiveness of the attacks against the state court order and judgment * * * and the existence and propriety of defendant's acts, * * * and the result would certainly establish an adverse precedent for the intervenors. Damage would be done and undue prejudice may result. * * * and the applicants would be 'bound' by the determinations thereof in a very practical sense, * * * and would gain or lose by the direct legal operation of the judgment * * *. We prefer to give the word 'bound' this utilitarian construction * * *. The presence of the words 'may be' in the Rule clearly indicate that the judgment does not always need to be strictly res judicata. * * *"

For more restricted opinions see Formulabs, Inc. v. Hartley Pen Company, 275 F (2) 52; Sam Fort Publishing Co., Inc. v. United States, 366 U.S. 683.

Applicant further maintains that it is entitled to intervene in this proceeding under the provisions of subsection (3) of Rule 24 (a) of the Federal Rules of Civil Procedure, which reads as follows:

"Upon timely application anyone shall be permitted to intervene in an action: * * * (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of an officer thereof."

As stated earlier in this memorandum, applicant is concerned with the ability of the entity which will emerge from this court's order of divestiture to meet the natural gas needs of the people of the State of Utah. Obviously, if [fol. 346] such entity does not have competent management, or lacks the financial ability or natural gas resources to meet the expanding requirements for natural gas, appli-

cant and the people it represents will be adversely affected. Applicant has the duty of fixing rates for natural gas distributors in Utah. If the new entity to be created is unable to supply natural gas at a reasonable cost to Utah distributors, it will have an effect on the rates applicant must set for such distributors.

Applicant has pointed out in this memorandum that a more liberal attitude is taken toward intervention by governmental bodies than by private parties, and that they need not have a direct personal or pecuniary interest in the subject of the litigation. There are many instances, however, in which intervention by governmental bodies has been denied because of the remoteness of their interest. See Commonwealth Edison Company v. Allis Chalmers Manufacturing Company, 315 F (2) 564; Sutphen Estates, Inc. v. United States, 342 U.S. 19; 72 S. Ct. 14; Philadelphia Electric Co. v. Westinghouse Electric Corporation, 308 F (2) 856.

Dated November 19, 1964.

Respectfully submitted,

H. Wright Volker, Assistant Attorney General, State of Utah.

[fol. 347] Affidavit of Service (omitted in printing).

[fol. 349]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants.

STATEMENT OF THE STATE OF CALIFORNIA IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE—Filed November 20, 1964

In support of the application for leave to intervene heretofore filed, California represents and states to the court as follows:

I.

The State of California and its gas distributing utilities are the principal customers of the El Paso Natural Gas Company. California is vitally affected by these divestiture proceedings.

II.

This is a proceeding of an unusual nature involving regulated corporations as to which the Federal Power Commission, under the Natural Gas Act, has jurisdiction ultimately over contractual arrangements and rates and charges which are to be affected by these proceedings.

[File endorsement omitted]

III.

California initially opposed the stock and asset acquisitions herein and is concerned that this divestiture proceeding will, contrary to the mandate of the United States Supreme Court, permit acquisition by individual share-[fol. 350] holders of El Paso so that, in fact, the El Paso Natural Gas Company will continue to control and to dominate the Pacific Northwest Pipeline Corporation.

IV.

Because of the impact of the divestiture upon the California market by virtue of the contract arrangements proposed, California has an interest which is not protected by the Department of Justice and has a right to intervene to protect such interest. Rule 24(a) (3) of the Federal Rules of Civil Procedure.

V.

California asserts that it has not yet been served with the material requested of El Paso Natural Gas Company by the United States of America, plaintiff herein. Accordingly, California is unable, at this time, to do more than assert its request for intervention and its request to participate in these proceedings to examine and to cross-examine witnesses and to present such testimony and evidence as may be required to protect California's interest.

In conclusion, California asserts that it is critical to a correct disposition of these proceedings, that this Honorable Court direct the El Paso Natural Gas Company to so dispose of its equitable ownership of the Pacific Northwest Pipeline Corporation so as to render Pacific Northwest Pipeline Company independent and ultimately competitive. Absent a decree embodying such provisions, any divestiture plan will be contrary to the mandate of the Supreme Court of the United States.

[fol. 351] Wherefore, California prays for an order of this court permitting California to intervene in the above-entitled cause and to participate therein as a party in intervention in such cause.

Dated: November 19th, 1964.

Respectfully submitted,

William M. Bennett, Special Counsel for The People of the State of California.

[fol. 352] *Duly sworn to by William M. Bennett, jurat omitted in printing.*

[fol. 353] Certificate of Service (omitted in printing).

[fol. 355]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants,

NORTHWEST NATURAL GAS COMPANY, Applicant for Intervention.

MEMORANDUM ON MOTION TO INTERVENE
—Filed November 20, 1964

Pursuant to leave granted by this Court by order dated October 21, 1964, this memorandum is submitted by Northwest Natural Gas Company, hereinafter sometimes referred to as "Applicant" or "Northwest".

When the Supreme Court of the United States delivered its opinion of April 6, 1964, ordering divestiture in this case it became apparent to Northwest that it would be directly affected by such a divestiture. Because of the possible adverse effect upon its stockholders, debt security holders and utility customers which could result from the manner of and means by which such divestiture might be accomplished, Northwest filed its Motion to Intervene in this proceeding on July 29, 1964. The nature and extent of Northwest's interest in this matter, and the areas of

[File endorsement omitted]

concern justifying such interest and to which its evidence would relate, were set forth in said Motion to Intervene.

Northwest considered that its right to intervene stemmed from the language of Rule 24 of the Federal Rules of Civil Procedure, wherein intervention is allowed of right "when the representation of the applicant's interest by existing parties *is or may be inadequate* and the applicant *is or may be bound* by a judgment in the action", (Rule 24 (a) (2)), or "when the applicant is so situated as to be adversely affected by a distribution or *other disposition of property* which is in the custody or *subject to the control or disposi-* [fol. 356] *tion* of the court or an officer thereof". (Rule 24 (a) (3)) (Emphasis Supplied)

At the time Northwest filed its Motion to Intervene, no plan of divestiture had been proposed. The plan submitted to the Court on October 19, 1964 was made available to Northwest on October 14, 1964 and from a preliminary examination thereof, together with the presentation of the proposal by El Paso Natural Gas Company (El Paso), on the 19th, it appeared to Northwest that there were some questions as to whether under the proposed plan a fair and adequate allocation of reserves would be made to New Company; whether because of certain aspects of the plan the cost of gas to New Company might be so high as to require increased rates in order to provide a fair rate of return; and whether a forecast of earnings for the single year 1965 was sufficient to indicate that New Company would have adequate earning capacity.

Since these questions involved matters which could adversely affect the interests of Northwest as described in its Motion to Intervene, the principal areas of concern to Northwest were: (1), that New Company have sufficient reserves to supply the needs of Northwest and other distributors; (2), that New Company's cost of gas be low enough to prevent any need for increased rates to said distributors; (3), and that New Company for the reasonably foreseeable future be capable of earning the fair rate

of return necessary to enable it to meet the increasing growth and demands of the markets it would serve. Following the hearing before this Court on October 19, therefore, additional data and information were requested from and willingly provided by El Paso.

The additional facts and information materially clarified the areas of concern above mentioned and, after a careful analysis thereof, Northwest has concluded that the present plan of divestiture filed by El Paso will not adversely affect Northwest and Northwest will enter no objections thereto. However, in the event major changes in the El Paso plan of divestiture are suggested by others, or different plans proposed, which might adversely affect Northwest if incorporated in any proposed order, interlocutory decree or final decree hereinafter presented to the Court, it is essential that Northwest continue to be in a position to protect its interest in this proceeding.

[fol. 357] In view of the foregoing it is requested that the Court's ruling on Northwest's Motion to Intervene be deferred until the occurrence of any of the above described events or final determination of this matter.

Respectfully submitted,

Harold W. Pierce, Attorney for Northwest Natural Gas Company, Applicant for Intervention, 735 S. W. Morrison Street, Portland, Oregon 97205, Telephone: Area Code 503, 226-4211.

Local Counsel

Rex J. Hanson, Esq., Hanson and Baldwin, Kearns Building, Salt Lake City, Utah, Telephone: Area Code 801, 359-7611.

[fol. 358] Certificate of Service (omitted in printing).

[fol. 360]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

No. C 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants.

MEMORANDUM IN SUPPORT OF INTERVENTION OR AMICUS CURIAE—Filed November 20, 1964

The request to intervene in these proceedings, or in the alternative, the request to appear as amicus curiae by the Paradox Production Corporation is based upon the public interest which is to be served by this divestiture and which public interest is the most important single interest to be given consideration in these proceedings.

In considering its extent of review over a district court's decree entered in a divestiture case, the Supreme Court of the United States in *United States* v. *E. I. du Pont De Nemours and Co.*, 366 U. S. 316, gave voice to this latter thought.

The Court stated:

> "In sum, we assign to the District Courts the responsibility initially to fashion the remedy, but recognize that while we accord due regard and respect to the conclusion of the District Court, we have a duty ourselves to be sure that a decree is fashioned which

[File endorsement omitted]

will effectively redress proved violations of the antitrust laws. The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. 'A public interest served by such civil suits is that they effectively pry open to compe- [fol. 361] tition a market that has been closed by defendants' illegal restraints. If this decree accomplished less than that, the Government has won a lawsuit and lost a cause.' International Salt Co. v. United States, supra, 332 U. S. at page 401, 68 S. Ct. at page 17.

The Court further stated:

"These principles alone would require our close examination of the District Court's action. But the necessity for that examination in this case further appears in the light of additional considerations. First of all, the decree was fashioned in obedience to the judgment which we sent down to the District Court after our reversal of that court's dismissal of the Government's complaint. We have plenary power to determine whether our judgment was scrupulously and fully carried out. Chief Justice Taft, speaking for the Court, said in Continental Ins. Co. v. United States, 1922, 259 U.S. 156, 166, 42 S. Ct. 540, 543, 66 L.Ed. 871, 'We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power, where the compliance has been attempted and the decree in any proper way is brought to our attention, to see that it follows our opinion.' Secondly, the record is concerned mainly with the alleged adverse tax and market effects of the Government's proposal for complete divestiture. But the primary focus of inquiry, as we shall show, is effectively

to eliminate the tendency of the acquisition condemned by Sec. 7. For it will be remembered that the violation was not *actual* monopoly but only a *tendency* towards monopoly. The required relief therefore is a remedy which reasonably assures the elimination of that tendency. Does partial divestiture in the form of the 'pass through' of voting power, together with the ancillary relief, give an effective remedy, or is complete divestiture necessary to assure effective relief? Little in the record or in the District Court's opinion is concerned with that crucial question. The findings of possible harsh consequences relied upon to justify rejection of complete divestiture are thus hardly of material assistance in reaching judgment on the central issue. If our examination persuades us that the remedy decreed leaves the public interest in the elimination of the tendency inadequately protected, we should be derelict in our duty if we did not correct the error."

[fol. 362] The plan presented by El Paso and its so called "New Company" flies in the face of the du Pont case. Its plan envisages El Paso stockholders becoming the stockholders of New Company. In addressing itself to this selfsame situation the Supreme Court states:

"The divestiture only of voting rights does not seem to us to be a remedy adequate to promise elimination of the tendency of du Pont's acquisition offensive to Sec. 7. Under the decree, two-thirds of du Pont's holdings of General Motors stock will be voted by du Pont shareholders—upwards of 40 million shares. Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate community of interest which we found to violate the law. The du Pont shareholders will *ipso facto* also be General Motors voters. It will be in their interest to vote in such a way as to induce General Motors to

favor du Pont, the very result which we found illegal on the first appeal. It may be true, as appellees insist, that these shareholders will not exercise as much influence on General Motors as did du Pont when it held and voted the shares as a block. And it is true that there is no showing in this record that the du Pont shareholders will combine to vote together, or that their information about General Motors' activities will be detailed enough to enable them to vote their shares as strategically as du Pont itself has done. But these arguments misconceive the nature of this proceeding. The burden is not on the Government to show *de novo* that a "pass through" of the General Motors vote, like du Pont's ownership of General Motors stock, would violate Sec. 7. United States v. Aluminum Co. of America, D.C.S.D.N.Y. 1940, 91 F.Supp. 333, 346. It need only appear that the decree entered leaves a substantial likelihood that the tendency towards monopoly of the acquisition condemned by Sec. 7 has not been satisfactorily eliminated. We are not required to assume, contrary to all human experience, that du Pont's shareholders will not vote in their own self-interest. Moreover, the General Motors management, which over the years has become accustomed to du Pont's special relationship, would know that the relationship continues to a substantial degree, and might well act accordingly. The same is true of du Pont's competitors. They might not try so vigorously to break du Pont's hold on General Motors' business, as if complete divestiture were ordered."

It thus becomes apparent that there will have to be some third person who is not a stockholder of El Paso and who has the necessary finances and "know how" to conduct the [fol. 363] business of a huge interstate pipeline system in competition with El Paso. That such individual appears would be in furtherance of the public interest to insure a

complete divestiture of the assets and business and accretions thereto which El Paso obtained as a result of violating Sec. 7 of the Clayton Act with a consequent resumption of competition.

Attached to the Motion to Intervene of Paradox Production Corporation is its proposal for divestiture. This proposal discloses that it was organized by men who had been with the Fish Northwest Constructors, the builders of the Pacific Northwest pipeline, and executives who had been with Pacific Northwest Pipeline Company at the time it was acquired in 1957 by El Paso. They played dominant roles in the operation of the old Pacific Northwest Pipeline Company and are now operating Paradox Production Corporation and are willing to devote their abilities and energy to the operation of this pipeline. They are individuals well versed in the natural gas business. The proposal contemplates the return to operation of the old Northwest Pipeline Company with its fair share of the increased assets and gas reserves as a strong and independent company in competition with El Paso.

The management of Paradox comes highly recommended and it has the necessary financial backing to assure the Court of the continued operation of the pipeline and the proposal is to operate the pipeline in line with the desires of the present customers of El Paso and who will be dependent upon the new company.

No other person has appeared in these proceedings in the role in which Paradox Production Corporation presents itself. Without one or more persons in this role, the Court will find itself in these proceedings without a choice of management of the new company which will be uninfluenced [fol. 364] by El Paso. Someone will have to operate and maintain this new company. In the public interest and to carry out the divestiture order of the United States Supreme Court this operation should not be left to the now executives or stockholders of El Paso who, of a certainty, would be beholden to that company and would not put in to the pipeline field an active and strong competitor as con-

templated by the Supreme Court and required by the terms and provisions of the Clayton Act. Paradox Production Corporation and others like it are the only source to which the Court can turn to obtain persons knowledgeable in the natural gas pipeline business and who have the necessary financial backing to assure the Court the success of a new company as an independent competitor. Public interest requires that persons in this position participate in these divestiture proceedings in order that the Court may have the aid and assistance of persons not under the influence of El Paso and to afford the Court a choice of independent management for the new company.

In furtherance of the public interest to be served, we submit that the Court should either grant leave to the Paradox Production Corporation to intervene or grant it leave to appear as amicus curiae.

Respectfully submitted,

Brigham E. Roberts, Rawlings, Wallace, Roberts & Black, Suite 530, Judge Building, Salt Lake City, Utah;

C. Keefe Hurley, Earle C. Cooley, Hale and Dorr, 60 State Street, Boston, Massachusetts,

Counsel for Paradox Production Corporation.

Dated: November 19, 1964

[fol. 365] Certificate of Service (omitted in printing).

[fol. 367]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants,

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Intervenor,

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BRIEF IN SUPPORT OF AMENDED APPLICATION FOR LEAVE TO INTERVENE—Filed November 24, 1964

The Washington Utilities and Transportation Commission, an applicant for intervention herein, submits it should be allowed to intervene under both paragraphs (a) and (b) of Rule 24 of the Rules of Civil Procedure. In presenting our argument in support of such contention we shall cover four main propositions:

(1) The interest of applicant in the proceedings;

(2) Representation of interest of applicant by existing parties is or may be inadequate and applicant may be bound by the decree and adversely affected thereby;

(3) Applicant's claim and the main action have a question of law or fact in common; and

(4) Specific claims for which intervention is sought.

[File endorsement omitted]

[fol. 368] Prior to discussing these four propositions we advise the court that the Washington Commission's position is not one of outright opposition to the general plan of divestiture as such. What applicant seeks are merely modifications to the plan, assuming the vehicle of disposition of control to El Paso's common stock holders is otherwise satisfactory to the Department of Justice and to the court. The modifications we seek will be discussed under (4) and would require (a) divestment to new company of a fair share of El Paso's post-acquisition and merger San Juan Basin reserve increases; (b) reinstatement of premerger arrangement pertaining to disposition of Kingsgate gas; (c) recognition on new company's balance sheet of the contribution made by Pacific Northwest's tax loss carry forwards which substantially reduced El Paso's federal income tax liability; (d) divestment by El Paso to new company of the Westcoast Transmission Company common stock previously owned by Pacific Northwest; and (e) continuation of former San Juan Basin gathering charge until such time as a change therein may be approved by the Federal Power Commission.

With these preliminary comments we turn to consideration of the four main propositions as stated in the opening paragraph.

I. *Interest of Applicant in Proceedings.*

The interest of the applicant in this proceeding is outlined in general terms in paragraphs I, II and III of our amended application for leave to intervene. The Washington Utilities and Transportation Commission is charged under the provisions of RCW 80.01.040 with the duty of regulating in the public interest the rates, services, [fol. 369] facilities and practices of companies engaging within the State of Washington in the business of supplying any utility service or commodity, including natural gas, to the public for compensation. By the provisions of RCW 80.28.020, the Commission has the duty of determining just

and reasonable rates and practices to be observed by such companies. It is a primary obligation of the Commission to protect the users and consumers of natural gas, and the public generally, from unjust and unreasonable exactions and practices and to obtain for them adequate service under just and reasonable rates and practices. To this end the applicant represents the interests of users and consumers in controversies before any federal court or commission involving matters affecting rates and practices.

Prior to merger Pacific Northwest Pipeline Corporation was the sole supplier of natural gas to distribution companies in the State of Washington. Since the merger El Paso Natural Gas Company has succeeded to that position. Upon divestiture the new company will become the sole supplier of natural gas to the distribution companies in our state.

The new company, as the sole supplier of natural gas to our area, will commence business with a capital structure and investment, a balance sheet, a gas supply and projected revenues and expenses, which will be dictated by the details of the divestiture decree in this proceeding. The details of that divestiture decree will determine the new company's ability to render service under reasonable rates and practices as they affect the interests of consumers in the State of Washington.

Customarily, the foregoing items are matters that are inquired into in great detail in proceedings under Section [fol. 370] 7 of the Natural Gas Act for a certificate of public convenience and necessity. In such proceedings a state regulatory agency is given the automatic right of intervention. By that right of intervention a state regulatory agency is enabled to participate fully in the proceeding, to either support or oppose the grant of authority sought, to propose the attachment of conditions to any grant of authority and to avail itself of the right of judicial review. In the instant proceeding, by virtue of the decision of the Supreme Court of the United States (*U.S.* v. *El Paso Nat-*

ural Gas Co., 376 U.S. 651), it is within the jurisdiction of this court, not the Federal Power Commission, by its decree of divestiture to determine what shall be the capital structure, the balance sheet, the investment, the gas supply, and other factors which will result in the projected expenses and revenue of the company to become our sole supplier of natural gas.

Certainly the interest of the Washington Commission cannot be said to be any less real or less substantial in the instant proceeding than it would be in the case of an applicant before the FPC in a Section 7 proceeding for authority to serve a market not previously served by it. Any state regulatory body not exercising its right of intervention in an FPC certificate proceeding involving an application by one seeking to become the sole supplier of huge volumes of natural gas for ultimate sale to consumers therein, could be subject to legitimate criticism. We say this for the reason that effective regulatory jurisdiction over rates to consumers cannot be exercised unless there is assurance that the pipeline supplying the gas to the distribution companies is one that itself will be able to render service to the distribution companies under reasonable rates and [fol. 371] practices. If the Washington Commission is to be denied intervention in these proceedings, it will not be able to have the same rights that it would have in a Section 7 application even though it will be required to live with the divestiture decree just as it would be required to live with an FPC order under Section 7 of the Natural Gas Act by a company seeking to become the sole supplier to our area.

We recognize that at some point the new company will be required to procure from the Federal Power Commission a certificate under Section 7 of the Natural Gas Act. We would observe, however, that any jurisdiction of the FPC over certification of the facilities of the new company offers no effective forum where the details of that application become fixed in many substantial particulars by the

terms of the divestiture decree. We cannot visualize the FPC as a practical matter determining anything more than whether the company emerging under the divestiture decree meets the minimum requirements for certification for present markets. The FPC may have, and probably would have, jurisdiction over the rate portion of any contracts between El Paso and the new company that may come into being as a result of the divestiture or otherwise. We know of no authority, however, by which in the Section 7 proceeding the FPC could require El Paso to divest to the new company additional San Juan reserves to which it might be entitled, to reinstate the pre-merger arrangement pertaining to disposition of Kingsgate gas, to require El Paso to modify the divestiture plan so as to have recognized on the new company's balance sheet the contributions made [fol. 372] by Pacific Northwest tax loss carry forwards which substantially reduced El Paso's federal income tax liability, or to require divestment by El Paso to the new company of Westcoast stock previously owned by Pacific Northwest. These are matters of utmost interest to the Washington Commission in its capacity as the guardian of the public interest of our consumers in our area, and are matters which can only be reached by the tribunal having primary jurisdiction over divestment. Such tribunal of course, is this court.

Basic to the decision of the United States Supreme Court was the proposition that had Pacific Northwest remained independent there can be no doubt it would have sought to exploit its formidable geographical position with relation to entry into the California market. The new company will come into existence with a seven-year moratorium having been imposed upon it in that effort by virtue of El Paso's acquisition. Any plan of divestiture, if it is to right the wrong, must recognize that fact and compensate for it to every reasonable extent. The new company is obviously unable to advance its interests in seeking to be compensated for this seven-year moratorium for the simple

reason that it is not in existence and its proposed management has had and can have no negotiations as a truly independent entity with El Paso at this time. In its absence, the regulatory agency of the state in which the Pacific Northwest company had, and the new company will have, its greatest volume of sales, should be acknowledged as having a real and substantial interest in the details of the divestiture decree.

We have previously noted that the jurisdiction of the FPC in the ensuing Section 7 proceeding will be severely [fol. 373] limited. This is particularly true with regard to giving meaning and effect to the very basic principle upon which the Supreme Court of the United States based its order, namely, that had Pacific Northwest remained independent there can be no doubt it would have sought to exploit its formidable geographical position with regard to the California market. We believe the Federal Power Commission will acknowledge that in its Section 7 proceeding it will claim no jurisdiction to require that the new company have divested to it additional San Juan Basin reserves to which we contend it is entitled if it is not to be penalized for the seven year moratorium imposed upon it by El Paso's acquisition and merger. We contend that new company is entitled to a fair share of the post-acquisition and merger San Juan Basin reserve increases developed by El Paso. And we further contend that it is only by virtue of the decree of this court that this can be accomplished. Unless we are to have the right to be heard by this court, we will be without any forum in which to have our interests considered.

We think the foregoing abundantly supports the proposition that the applicant has an interest in these proceedings, that such interest can only be protected in these proceedings and that applicant should be granted in these proceedings the same status as El Paso, namely, that it become a party.

II. *Representation of Interest of Applicant by Existing Parties Is or May Be Inadequate and Applicant May Be Bound By the Decree and Adversely Affected By the Decree.*

The existing parties to the proceeding are El Paso and the Department of Justice.

[fol. 374] Pacific Northwest Pipeline Corporation has been completely merged into El Paso Natural Gas Company and is therefore not in a position to protect its own interests or the interests of the public previously served by it in the State of Washington. The new company as the successor to the now extinct Pacific Northwest Pipeline Corporation is not in existence and accordingly it has not been a party to any negotiations culminating in El Paso's divestiture proposal.

The management of El Paso Natural Gas Company has, in effect, been negotiating with itself, subject to subsequent agreement or disagreement by the Department of Justice, and subject to approval by the court, in the development of the divestiture proposal. The management of El Paso may have interests in the disposition of assets presently subject to the jurisdiction of this court which are in conflict with the interests of applicant and the people of the State of Washington.

We turn now to a consideration of the question whether representation of the interest of the applicant by the Department of Justice is or may be inadequate.

At this point of the proceeding there no longer remains any issue as to whether there has been a violation of the antitrust laws. That matter was resolved by the decision of the United States Supreme Court. This in itself distinguishes the case from those in which intervention by a state agency may have been denied in antitrust matters. As the court noted at the hearing October 20th, this is a brand new proceeding.

While the United States, acting by and through the Attorney General, is properly characterized as the guardian

of the public interest insofar as the competitive aspects of antitrust litigation and divestiture are concerned, appli- [fol. 375] cant does not believe the position of the United States to be one of primary concern with the significance of some of the details involved in divestiture as they vitally affect the best interests of the users, consumers and general public within the State of Washington from the standpoint of rates and service.

While it will not be the function of this court in the divestiture proceeding to issue a certificate, nevertheless it will be within the sole jurisdiction of this court to determine the conditions and facts and circumstances upon which the new company will proceed to seek a certificate. We do not believe it to be in keeping with a recognition of the responsibilities of a state regulatory agency to have it left to the possibility that some other agency such as the Department of Justice will under those circumstances advance what we firmly believe to be our legitimate interest.

In a very real sense, applicant will be bound by the decree as entered by this court. The decision of the United States Supreme Court did not prescribe the method by which divestiture is to be accomplished. The plan for divestiture must necessarily result in the creation of a new company having a capital structure, investment, balance sheet, gas supply, and projected revenue and expenses, which will dictate to a large extent its ability to render service under reasonable rates and practices as they affect the interest of consumers in the State of Washington and to become once again so constituted as to be able to exploit its formidable position with regard to the California market. The method of divestiture will establish conditions which the FPC for all practical purposes must accept and in turn will establish conditions under which rates and practices to [fol. 376] customers within the State of Washington must be established. The consumers and users in the State of Washington, and applicant, will therefore be bound by any order establishing the method of divestiture.

The foregoing amply supports the proposition that we will be bound by the order of divestiture. The extent to which we will be bound by the order goes far beyond the usual personal or pecuniary interest. The order will predetermine for many years to come as concerns our area most of the matters that form the basis for the regulation of rates and practices by the Federal Power Commission and the Washington Commission. The end purpose of all regulation, whether by the Federal Power Commission or the Washington Commission, is to assure adequate service under reasonable rates and practices. Obviously the method and details of divestiture in a case such as this are of vital importance in the effectuation of that purpose. The regulatory agencies can only deal with the facts as they then exist and those facts will be the facts that emerge from this divestiture over which this court only has jurisdiction.

We want to emphasize that it is not the intention of the applicant to inject the issue of *level* of rates into the instant proceeding, either to the distribution companies or to the ultimate consumer. The determination of divestiture methods which will irrevocably establish conditions under which rates are to be made and practices developed, however, is a matter of vital concern to applicant in the discharge of its responsibilities. We submit, therefore, that representation of that interest of applicant by any existing party is or may be inadequate and furthermore that applicant may be bound by the decree and adversely affected thereby.

[fol. 377] Under these circumstances intervention is proper under Rule 24(a). An unqualified right to intervene exists "When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by the judgment in the action."

III. *Applicant's Claim and the Main Action Have a Question of Law or Fact in Common.*

Under paragraph (b), relating to permissive intervention, of Rule 24 of the Rules of Civil Procedure, the court in its discretion may allow intervention when an applicant's claim or defense and the main action have a question of law or fact in common. Discussion under numbered sections I and IV of this brief establishes that applicant's claims have questions of law or fact in common with the main action. Each modification we seek to El Paso's divestiture proposal relates either to assets subject to treatment by the court in formulating the divestiture decree or to contractual arrangements at issue in divestiture. Whether one may object that we are not within the exact statement of Rule 24(a), nevertheless the Washington Commission's intervention is in furtherance of the interest of its gas consumers and should be allowed under the ruling in *Securities and Exchange Commission* v. *United States Realty and Improvement Company*, 310 U. S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940).

The holding in *Mitchell* v. *Singstad*, 23 F.R.D. 62 (1959), drew on the *United States Realty* case, *supra*, in allowing application by the State Roads of Maryland to intervene in an injunction action instituted by the Secretary of Labor. Plaintiff alleged defendant's employees were not [fol. 378] paid in accordance with the requirements of the Fair Labor Standards Act. No money damages were sought, only an injunction. The state sought intervention. Although the court observed that the interest of the state was otherwise adequately represented and the state was not entitled to a declaratory judgment, the court allowed the intervention, saying:

> "On the other hand, a decision by this court, or by the Court of Appeals or the Supreme Court on appeal, of the issues involved in this case, will affect the State of Maryland in its road building program. The State has a real interest in seeing that its views with respect

to the issues involved in this case are brought to the court's attention, that sufficient evidence is produced to support its contentions, and that an appeal be taken from any decision adverse to its position, even though defendants might be satisfied with a Pyrrhic defeat. Certainly the Commission, on behalf of the State, should be allowed to appear as amicus curiae, and for the reasons stated above in this paragraph should be allowed to intervene as a defendant if the court has the power to do so. Such intervention should be limited to the issues involved in the instant case and should not permit a broadening of those issues to convert the case into a declaratory judgment action. I have been assured by counsel that such intervention would not delay the trial.

"Grounds for intervention under a literal interpretation of Rule 24(a) or (b), F. R. Civ. P., 28 U.S.C.A. do not exist. However, where the public interest is clear, courts permit a state or a federal agency to intervene, as *parens patriae* or other grounds. *Securities and Exchange Comm.* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 459, 460, 60 S. Ct. 1044, 84 L. Ed. 1293, and cases cited; *People of State of California* v. *United States*, 9 Cir., 180 F. 2d 596, 601; XVIII N.Y.U.L.Q. Rev. 148-150. Intervention by private groups has been permitted in unusual cases where the public interest was sufficiently imperative. *Textile Workers Union of America* v. *Allendale Co.*, 96 U.S. App. D.C. 401, 226 F.2d 765. Admittedly there is strong authority to the contrary, but the decision in each case must be made on its own merits, in the light of the dominant purpose of the Federal Rules of Civil Procedure—to secure the just determination of every action. Rule 1."

[fol. 379] Certainly the foregoing offers ample authority for permissive intervention by the court under Rule 24(b)

in the instant case, even if objection be made to intervention as a matter of right. We assure the court our intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

We would also observe that one of the rules to which attention is currently being given by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is Rule 24(a). The draft by the advisory committee substitutes the following for (2) and (3) of Rule 24(a):

> "(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter substantially impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

This revision constitutes, of course, merely the proposal of the advisory committee, but it is indicative of some current thinking. We point this out, not for the purpose of suggesting applicant's position to intervene as of right is to be determined other than under present Rule 24(a) but rather to substantiate the propriety in any event of the court allowing permissive intervention if it be determined the present Rule 24(a) is not fully met.

IV. *Specific Claims for Which Intervention Is Sought.*

At the time of submission of our Amended Application for Leave to Intervene and Claim For Which Intervention is Sought, we enumerated, starting on page 5 thereof, seven particulars in which it was felt that inadequate information had been submitted by El Paso in the divestiture [fol. 380] plan filed with the court. Subsequent to that date representatives of El Paso have been in conference with representatives of the applicant. Those conferences have been instrumental, in some instances, in enabling appli-

cant to procure more detailed information than had previously been made available to it. Such conferences, however, have not resulted in eliminating certain matters of real concern as will be hereinafter enumerated. Sub-paragraphs (a) through (e) following constitute the specific claims for which we seek intervention.

Before discussing these claims some preliminary matters should be discussed.

We are not unmindful that on a purely technical basis the antitrust violation can be eliminated by any one of a myriad number of divestiture proposals. We believe, however, that the mandate of the Supreme Court would not be complied with by the effectuation of just any method of divestiture that would pass control from El Paso. In its opinion the Supreme Court made reference to Pacific Northwest as prospering and appearing to have strength enough to warrant a "treaty" with El Paso that protected El Paso's California markets. The Supreme Court also emphasized that Pacific Northwest was no feeble, failing company nor was it inexperienced and lacking in resourcefulness; it had adequate reserves, including "enormous" reserves in the San Juan Basin, and it was also possessed of managerial skill. The Supreme Court also noted that Pacific Northwest was so strong and militant that it was viewed with concern and coveted by El Paso. We submit that any decree of divestiture, rather than being measured solely in terms of eliminating the violation by any plan, must to every reasonable extent assure the creation of a company [fol. 381] in as near as possible the same position of strength Pacific Northwest would have enjoyed had it not been for its absorption by El Paso. This, in our judgment, requires that particular attention be given to the claims which we advance.

Under Tab 12 of El Paso's outline of its proposal for divestiture there appears an earnings estimate for the new company for the calendar year 1965. It is possible that El Paso will submit similar earnings statements for subse-

quent years. With regard to such earnings statements as prepared by El Paso we would only note that if the earnings projections be actually realized, such statements do not prove that no conditions should be attached to the proposal. The fact that a certain earnings projection may be realized does not mean that the proposal is an appropriate one for the simple reason that if the new company is entitled to the benefit of the modifications we propose, it may well be that those modifications would improve the earnings statement.

(a) Proposal Should Be Modified to Assure Divestment to New Company of a Fair Share of El Paso's Post-Acquisition and Merger San Juan Basin Reserve Increases.

We do not believe the test of legality of El Paso's divestiture proposal is in any way sustained by a showing a new company is created that is as near as may be to what Pacific Northwest was *before* the stock or asset acquisition. By acquisition and merger El Paso was freed of any competition from the acquired company in garnering additional reserves in the San Juan Basin. The Supreme Court noted Pacific Northwest at the end of 1957 "had an estimated 3.51 trillion cubic feet of gas reserves owned outright in the San Juan Basin; 1.04 trillion under contract in the San Juan Basin; . . . " Certainly the fact Pacific Northwest acquired such huge reserves in the San Juan Basin indi- [fol. 382] cates its appraisal of the attractiveness of this gas reserve area. El Paso likewise found the area attractive as demonstrated by its continuing acquisition of reserves in this area. And this continuing acquisition came about absent any competition for the same from Pacific Northwest.

To transfer to new company only the San Juan Basin reserves Pacific Northwest had at the time of acquisition or merger, leaving to El Paso all the after-acquired San Juan Basin reserves, would be to reward El Paso for its viola-

tion of the Clayton Act. This we contend would not be an appropriate result from a divestiture decree which should be designed to remedy the wrong occasioned by the Clayton Act violation. We recognize it is not the function of a divestiture decree to impose a penalty upon the company causing the violation and what we propose is not a penalty in any sense. What we propose is necessary, however, unless new company is to start operations with a penalty imposed upon it by way of a lesser quantity of San Juan Basin reserves than Pacific Northwest would probably have had except for its illegal acquisition and merger.

At this point we expect El Paso to complain that we are engaging in improper speculation. Admittedly no one can say with certainty that, if there had been no stock or asset acquisition, Pacific Northwest would have continued to be as successful in garnering San Juan Basin reserves in competition with El Paso. We do know, however, it had already developed huge reserves there in competition with El Paso and that its status as an El Paso competitor in the development of additional reserves was eliminated by El Paso's stock acquisition and subsequent merger action. As noted by the Supreme Court, Pacific Northwest was prospering and appeared strong enough to warrant a treaty with El [fol. 383] Paso that protected El Paso's California markets. In the divestiture there must be assurance that the consequences of this illegal treaty are not perpetuated by the manner of divestiture. As pointed out in the Supreme Court opinion, Pacific Northwest had proximity to the California markets and had "enormous reserves in the San Juan Basin." Reserves in that area are particularly well situated for service to California. The court said that had Pacific Northwest remained independent, there would have been no doubt it would have sought to exploit this formidable geographical position. The order (November 30, 1959) of the Federal Power Commission examiner in the merger proceedings (Docket G-13018 and G-13019) provides further evidence of the fact that Pacific was, and

would have continued to be, a competitor for gas in the San Juan Basin area. As stated on page 31 of said order:

> "So far as El Paso and Pacific, as separate companies, are concerned, Pacific will be eliminated by the merger as a competitor for available gas reserves in producing fields economically accessible to both it and El Paso. Pacific would definitely be a competitor in the San Juan Basin, . . ."

Thus it is imperative that new company be restored a proper share of the San Juan Basin reserves acquired by El Paso subsequent to merger when El Paso was freed of the competition for the same by the illegal acquisition of and merger with Pacific. Unless this be accomplished new company will have visited upon it a penalty by El Paso which would serve to perpetuate the consequences of the antitrust violation upon which the Supreme Court decision was rested.

It appears that El Paso places great reliance upon its portrayal that the reserve life index and deliverability life of both new company and remaining El Paso will be ap- [fol. 384] proximately the same under the divestiture proposal. We would caution that this is not a test of propriety of the divestiture proposal for the reason that there is no showing of what El Paso's reserve life index and deliverability life was prior to the stock and asset acquisition. But in any event we are here concerned with the proposition that the new company should have divested to it additional San Juan Basin reserves to which it is entitled.

Certain data has been submitted to applicant by El Paso with relation to reserves in the San Juan Basin. The data submitted purports to reflect reserves evaluated by El Paso's present methods. Subsequent to merger El Paso has acquired over three trillion cubic feet of gas reserves in the San Juan Basin. Of this amount El Paso has acknowledged that approximately two trillion cubic feet con-

stitute reserves acquisitions as to which it had no prior options. Whether the remainder was acquired pursuant to prior options has not been adequately demonstrated. The data submitted by El Paso further shows that between January 1, 1957 and January 1, 1960 it acquired reserves in excess of one trillion cubic feet in the San Juan Basin as to which it had no prior options, resulting in approximately three trillion cubic feet of San Juan Basin gas acquired after 1957 as to which it had no prior option. El Paso proposes to divest to new company none of these San Juan Basin reserves acquired by El Paso subsequent to the stock acquisition or the asset merger. As of both the date of stock acquisition and merger El Paso's own portrayal to applicant of reserves establishes that Pacific Northwest had approximately 20% of the combined reserves of Pacific and El Paso in the San Juan Basin. We [fol. 385] have previously demonstrated that it is totally unreasonable to assume that an independent Pacific Northwest would not have been an aggressive competitor for these added San Juan Basin reserves. We contend new company is entitled to have divested to it approximately 20% of the aforesaid three trillion cubic feet of additional San Juan Basin reserve acquisitions.

(b) Proposal Should Be Modified to Require Reinstatement of Pre-merger Arrangement Pertaining to Disposition of Kingsgate Gas.

Subsequent to acquisition of control but prior to merger, arrangements had been completed between El Paso and Pacific Northwest pertaining to the disposition of the Kingsgate gas. This is referred to as the X-5 Schedule. Any of the quantities of such gas as were not needed by Pacific Northwest would be purchased by El Paso at Pacific Northwest's costs under an exchange arrangement. By its divestiture proposal El Paso would substitute for that arrangement a new form of contract as included under Tab 5 of its proposal for divestiture.

The arrangement previously referred to had been arrived at prior to merger. It appears to be El Paso's contention that the arrangement was developed subsequent to acquisition of control and that therefore it is under no obligation to continue with that arrangement upon divestiture. We submit that an arrangement entered into between the two companies at such time as El Paso had a pecuniary interest in the result of that arrangement upon Pacific Northwest is an excellent indication of what El Paso thought was fair to Pacific Northwest. Such arrangement should not be abrogated.

It is not now for the court to become concerned with all of the possible technical contentions that may be advanced [fol. 386] with relation to Kingsgate gas but rather the court may well proceed on the basis that an arrangement found fair by El Paso at such time as it had a pecuniary interest in Pacific Northwest should be continued. This should be particularly true in the instant circumstances when there is not now an independent management of the new company whose views can be heard.

(c) Proposal Should Be Modified to Require Recognition on New Company's Balance Sheet of Contribution Made by Pacific Northwest Tax Loss Carry Forwards Which Substantially Reduced El Paso's Federal Income Tax Liabilities.

From information furnished applicant by El Paso it appears El Paso was able to reduce its federal income tax liability by over $25,000,000.00 by the utilization of previous tax loss carry forwards of Pacific Northwest. These tax loss carry forwards were obviously of great value to El Paso and it is safe to assume that their existence was most attractive to El Paso in determining to absorb Pacific Northwest. They may be characterized as being of the same nature as an acquired asset. There is probably no way of restoring them to new company. However, every effort

should be made to have recognized upon the balance sheet of the new company the fact that El Paso has gained many millions of dollars (by way of tax reduction) from the acquisition. This benefit should be reflected in the new company's accounts by reducing the capital stock account and creating another account, either a surplus account or a tax reserve account, in the amount by which El Paso was thus able to reduce its tax liability.

In any event, no matter what treatment be ordered as a result of El Paso's having been able to substantially reduce its federal income tax liability on this account, it must be [fol. 387] stressed that El Paso will remain a beneficiary to this extent of its absorption of Pacific Northwest. This should be kept in mind in evaluating the reasonableness of our suggested modifications to the proposal for divestiture, and particularly the modification next discussed.

(d) Proposal Should Be Modified to Require Divestment by El Paso to New Company of the Westcoast Transmission Company Common Stock Previously Owned by Pacific Northwest.

At the time of acquisition of Pacific Northwest by El Paso the former company was the owner of a substantial number of shares of common stock of the Westcoast Transmission Company. This stock represented an asset on the books of Pacific Northwest. El Paso's divestiture plan does not propose that such asset be divested to new company.

It is our claim that inasmuch as this stock did represent an asset of the acquired company, it should be returned to the new company. Whether the new company is to be allowed to retain such stock is of no moment. If for antitrust reasons or otherwise it is to be required to dispose of such stock the new company should be the beneficiary of the proceeds of the sale. The stock should be divested to new company at Pacific Northwest's purchase price as carried on Pacific Northwest's balance sheet prior to merger the same as will be so with any other former Pacific North-

west asset divested to new company. Any disposition of such stock at today's market price would result in a profit. There is no reason such profit should not inure to new company as successor to Pacific Northwest which owned the asset prior to merger.

(e) The Divestiture Proposal Should Be Modified to Require a Continuation of the Former San Juan Basin Gathering Charge Until Such Time as a Change Therein May Be Approved by the Federal Power Commission.

[fol. 388] El Paso's proposed contract as contained under Tab 4 of its proposal for divestiture would establish a San Juan Basin gathering charge of 4.5¢ per mcf. It appears to be El Paso's position that the 4.5¢ proposed charge is one that can be supported before the Federal Power Commission, which will have continuing jurisdiction over the gathering charge. Whether El Paso is right or not is beside the point. The point is that El Paso seeks to impose in this divestiture proceeding a gathering charge at a rate not yet approved by the FPC and differing materially from the only gathering charge previously employed between El Paso and Pacific Northwest. The 4.5¢ charge should not be made a part of the interlocutory decree establishing the conditions under which the new company will seek certification from the FPC. The interlocutory decree should contain a provision that El Paso, not the new company, should be required to sustain the burden of establishing before the FPC the reasonableness of the proposed gathering charge. In the meantime appropriate footnoting of any projected earnings statement can eliminate any possibility om misleading potential security holders.

Conclusion

We believe the foregoing justifies the granting of the Washington Commission's application for leave to inter-

vene. Aside from the disposition the court may make of that application, we suggest that the new management, after having been so designated by the court, should be given the opportunity to analyze applicant's proposed modifications and report to the court its conclusions. No doubt the proposed new management will be possessed of such knowledge and skill in the natural gas pipeline business as will make the results of its analysis meaningful. We therefore [fol. 389] strongly urge that no provision be contained in any interlocutory order which would establish the reserves or other assets hereinbefore discussed to be divested to new company nor approve the proposed contracts relative to Kingsgate gas or San Juan gathering charges until the new management has full opportunity to communicate its views to the court.

Respectfully submitted,

John J. O'Connell, Attorney General, Robert E. Simpson, Assistant Attorney General, Frank P. Hayes, Assistant Attorney General, Attorneys for Applicant Washington Utilities and Transportation Commission.

Office and Post Office Address: Temple of Justice, Olympia, Washington.

[fol. 390] Affidavit of service (omitted in printing).

[fol. 391]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION,

STATE OF IDAHO, ex rel., Idaho Public Utility Commission, Applicant for Intervention.

MEMORANDUM IN SUPPORT OF APPLICATION FOR LEAVE TO INTERVENE—Filed November 24, 1964

Comes Now, The State of Idaho, ex rel. Idaho Public Utilities Commission, by and through the Attorney General of Idaho, and offers this memorandum in support of its application for leave to intervene.

This applicant desires to intervene in the present litigation upon the authority of Rule 24 of the Federal Rules of Civil Procedure. Applicant has discovered little authority relating to the topic of intervention in circumstances akin to that at bar.

In *United States* v. *Columbia Gas & Electric Corporation*, 28 F. Supp. 168 (1939), the cities of Detroit and Toledo sought to intervene in a situation somewhat analogous to the case at bar. However, it must be pointed out that the

[File endorsement omitted]

cities were only concerned with the impact the proposed divestiture might ultimately have upon the rates charged to consumers within their respective areas. The Court, in denying the motion for intervention stated at page 170:

> "The motions of both cities for orders granting them leave to intervene as parties defendant in this suit expressly state that their motions are based upon allegations in the annexed complaints. A reading of the complaints shows that the gravamen of each complaint is rates or charges for natural gas paid or to be paid by the users thereof. Gas rates, present and future, are outside the scope of the issues raised by the Government's supplemental complaint. To be entitled to permissive intervention an applicant for intervention can not introduce issues outside the scope of the issues [fol. 392] raised in the main suit. United States v. Columbia Gas & Electric Corporation, D. C., 27 F. Supp. 116, 120."

In addition to the fact that in the above case two cities were attempting to intervene because of the impact that a divestiture would have on rate charges in their area, it should also be noted that this case was handed down shortly after the promulgation of the new Federal Rules of Procedure. Applicant has not discovered any other cases which have cited *United States* v. *Columbia Gas & Electric Corporation*, supra, as authority.

Possibly those opposing this application will cite *Commonwealth Edison Company* v. *Allis-Chalmers Manufacturing Company*, 315 F. 2d 564 (1963). The facts in this suit may be distinguished from the instant matter, mainly because the plaintiffs were corporations instituting antitrust litigation, and seeking damages. The Attorney General of the State of Illinois sought to intervene in the proceedings. The Seventh Circuit agreed with the District Judge that the Attorney General should not be allowed to intervene as of right, *but* reached its conclusion on a dif-

ferent basis, by making the following observation at page 566:

"... The rationale for our holding follows.

"The interests of plaintiffs and the consumers are different and arise from separate though related operative facts. The legal interest of plaintiffs which they are attempting to vindicate in these actions arises under the federal antitrust statutes. *The damages, if any, to which they are entitled are measured by the hurt they may have suffered by reason of the alleged conspiracies claimed to be violative of the antitrust laws.* That hurt is measured by the excessive prices they claim were paid for equipment purchased from defendants. The alleged conspiracies spent themselves on these purchasers. The aftereffects of the hurt on the consumers are consequential and too remote for the consumers to gain rights against the conspirators.

"The consumers' rights, if any, to reparation for their consequential hurt arise from higher rates and charges for services provided by plaintiffs. That is the proximate cause of their injury, not the antitrust violation. See Keogh v. C. & N. W. Ry. Co., 260 U. S. 156, 43 S. Ct. 47, 67 L. Ed. 183 (1922). The consumers' rights do not penetrate through to the antitrust conspiracies." (Emphasis added)

In the instant matter, the United States Department of [fol. 393] Justice is *not* seeking damages, but is solely interested in a divestiture plan which will affect the El Paso Natural Gas Company's assets to such a degree that the consumer market involved will be free of the monopolistic tendencies of the defendant, El Paso Natural Gas Company. Admittedly, the United States Department of Justice is not seeking monetary relief.

Applicant believes the ultimate decision in this suit must assure the consumer of natural gas within the State of

Idaho an economically stable supplier. The applicant believes this is also the desire of the United States Department of Justice and the El Paso Natural Gas Company. It is applicant's belief that the State of Idaho should have a right to be heard upon the proposed creation of a public utility from which the consumers of the State of Idaho will be compelled to receive its supply of natural gas.

In the case of *Mitchell* v. *Singstad*, 23 F. R. D. 63 (1959), a similar situation faced the United States District Court of Maryland. The United States Department of Labor brought an action under the Fair Labor Standards Act for injunctive relief against professional engineers who were under a contract with the Maryland State Roads Commission. The Maryland State Roads Commission sought to intervene, alleging that the issue involved in the case would affect the entire state road project. The Court, in allowing intervention, made the following cogent observation at page 64:

> ". . . . Grounds for intervention under a literal interpretation of Rule 24 (a) or (b), F. R. Civ. P., 28 U. S. C. A. do not exist. However, where the public interest is clear, courts permit a state or a federal agency to intervene, as parens patriae or other grounds. Securities and Exchange Comm. v. United States Realty & Improvement Co., 310 U. S. 434, 459, 460, 60 S. Ct. 1044, 84 L. Ed. 1293, and cases cited; People of State of California v. United States, 9 Cir., 180 F. 2d 596, 601; XVIII N. Y. U. L. Q. Rev. 148-150. Intervention by private groups has been permitted in unusual cases where the public interest was sufficiently imperative. Textile Workers Union of America v. Allendale Co., 96 U. S. App. D. C. 401, 226 F. 2d 765. Admittedly there is strong authority to the contrary, but the decision in each case must be made on its own merits, in the light of the dominant purpose of the Federal Rules of Civil Procedure—to secure the just determination of every action. Rule 1."

The above language luminates the applicant's strong [fol. 394] belief that, although its interests are similar to those of the United States Department of Justice and El Paso Natural Gas Company, the impact of the creation of a new natural gas utility company *which will be the sole supplier of natural gas in the State of Idaho,* is so great that the State of Idaho should be allowed to be heard upon any proposals of divestiture.

Applicant also calls to the court's attention Rule No. 1.8 (a) (1) of the Rules of Practice and Procedure before the Federal Power Commission which allows the State Commission to intervene as a matter of right. This Court shall determine which of the reserves should be divested from El Paso to the new company and will, in effect, be making a determination as to whether or not the new company can adequately serve the areas of Washington, Oregon and Idaho. Normally this function of determining whether or not a natural gas company had adequate reserves and financial backing to service an area would be within the sole jurisdiction of the Federal Power Commission. In such a proceeding, the State regulatory agency, in this case the Idaho Public Utilities Commission, would have a right to intervene and be allowed to be heard upon any such proposal. Because of the foregoing, this applicant believes that it has the right to intervene in the present proceedings, even though the proceedings are in the Federal District Court.

After carefully considering the plan of divestiture which the El Paso Natural Gas Company has filed with this Honorable Court, the Idaho Public Utilities Commission, while generally favoring the divestiture plan, does not give its wholehearted support to every segment of the plan.

Significant items such as the Kingsgate Gas contract, disposal of the West Coast Transmission stock, the interrelationship of the new gathering charge in the San Juan Basin equated with the transportation charge of Sumas gas that is exchanged with San Juan gas at Ignacio, illustrates this legitimate concern.

The above items of concern, along with the possible allocation of gas reserves in the San Juan Basin on a ratable basis between the El Paso Natural Gas Company and the "New Company," could be disposed of by this Honorable [fol. 395] Court approving of the new company's management in its interlocutory order; leaving open the final approval of the proposed plan until the "New Company" management has had an opportunity to satisfy themselves on the reasonableness of these items hereinbefore set out. "New Company" management would, if this course is followed, have an opportunity to assist the court, the Justice Department, and the Federal Power Commission in arriving at an equitable solution to a very difficult problem.

The Idaho Public Utilities Commission is in accord with the Supreme Court's instructions that the divestiture should be "without delay"; one of the grave dangers that underlies the present proceeding is that of numerous changes being proposed to the plan of the El Paso Natural Gas Company, creating a situation where no final plan is ever acceptable. The interests of the Northwest will surely not be served by having the Northwest Pipeline System in a state of suspension for an indefinite period of time before a new company is created.

Although this applicant now generally approves the proposed plan of divestiture now on file with this court, the applicant must remain in the position of intervention, in order that we would be allowed to have a voice in the creation of the natural gas company which will serve the sovereign State of Idaho.

Respectfully submitted,

Allan G. Shepard, Attorney General, State of Idaho,
Larry D. Ripley, Assistant Attorney General, State of Idaho, M. Allyn Dingel, Jr., Assistant Attorney General, State of Idaho.

[fol. 396] Certificate of Service (omitted in printing).

[fol. 398]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Civil No. 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants.

MEMORANDUM OF DEFENDANT EL PASO NATURAL GAS COMPANY IN OPPOSITION TO APPLICATIONS AND MOTIONS TO INTERVENE—Filed November 25, 1964

I.

Introduction: The Would-Be Intervenors and Their Conflicting Positions and Postures

There are now twenty strangers to this litigation seeking to become parties by "motions" and "applications" to intervene. Their claims to the rights of parties, including the right to appeal from a final divestiture decree, come long after the trial and entry of the judgment, which was reversed by the Supreme Court upon an opinion requiring "divestiture without delay". Every issue on the merits between plaintiff and El Paso has been finally adjudicated. All that remains is to fashion a divestiture decree which complies with the mandate of the Supreme Court.

Intervention is opposed by both El Paso and the United [fol. 399] States (Tr. 79, 109).[1]

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[1] "Tr. ——" refers to the transcript of the hearing held on October 19, 1964, at which the would-be intervenors in attendance

[File endorsement omitted]

The score of applicants and movants for intervention consist of the public utilities commissions of seven states,[2] the State of California (as distinguished from its public utilities commission), eleven natural gas distributing companies,[3] and Paradox Production Corporation, whose claim rests upon the astonishing assertion that it is entitled to intervene because it wishes to purchase the assets of which El Paso is to be divested.

The positions of these movants and applicants are in hopeless conflict; they reflect disputes among the would-be intervenors *inter se* respecting their conception of what will serve the "convenience and necessity" of the natural gas consumers they have undertaken to represent. The antitrust questions before the Court are paramount to such matters.

[fol. 400] The Utah and Wyoming Public Service Commissions, and seven distributing companies,[4] support El Paso's plan for divestiture. They ask to intervene only if the motion of another is granted.

The regulatory commissions of California, Idaho and Nevada, and Mountain Fuel Supply Company and Wash-

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were allowed until November 19, 1964, to file briefs in support of their motions and applications to intervene, which were then continued for hearing to December 2, 1964.

Italicized quoted matter has been supplied, except where otherwise indicated.

[2] California, Idaho, Nevada, Oregon, Utah, Washington and Wyoming.

[3] Cascade Natural Gas Corporation, Intermountain Gas Company, Mountain Fuel Supply Company, Northwest Natural Gas Company, Pacific Gas and Electric Company, Southern California Gas Company, Southern Counties Gas Company of California, Southwest Gas Corporation, Utah Gas Service Company, Washington Natural Gas Company and Washington Water Power Company.

[4] Intermountain Gas Company, Northwest Natural Gas Company, Southern California Gas Company, Southern Counties Gas Company of California, Southwest Gas Corporation, Washington Natural Gas Company and Utah Gas Service Company.

ington Water Power Company, confine themselves to claims of a right to represent consumers in their states and have taken no position on El Paso's plan. The Nevada commission would intervene only if the application or motion of another is granted.

Dissatisfaction with various details of El Paso's divestiture plan is alleged by the Oregon and Washington commissions, the State of California (as distinguished from its public utilities commission) and Cascade Natural Gas Company. Of course, Paradox Production opposes El Paso's plan because the plan does not contemplate a sale of assets to Paradox.

Pacific Gas and Electric Company appears to contend simply that this Court has no jurisdiction over the details of the divestiture ordered by the Supreme Court.

II.

No One Is Entitled to Intervene as of Right

In this Court the requirements of Rule 24 govern intervention. The Rule requires that an applicant be permitted [fol. 401] to intervene only upon a "timely application" showing that:

> (1) a statute of the United States confers an unconditional right to intervene,
>
> (2) the representation of the applicant's "interest" by the existing parties is or may be inadequate *and* the applicant is or may be bound by the judgment, or
>
> (3) the applicant will be adversely affected by disposition of property subject to the control of the Court.

A. None of the Applications or Motions is "Timely".

Rule 24 requires expressly that an application to intervene be "timely". The fact that each of the motions and applications before the Court was filed long after judgment was entered is itself a sufficient basis for denial.

Basle Theatres, Inc. v. *Warner Bros. Pictures Distr. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959), was a movie antitrust case in which would-be intervenors filed their applications after an appeal from the judgment had been dismissed in the course of settlement. The Court held (p. 477):

> "Where there is substantial litigation, tardy intervention will usually be denied. Intervention after judgment is unusual and not often granted. See Vol. 4, Moore's Federal Practice, §24.13. . . .
>
> ". . . as we have pointed out, the case has been concluded; a decree entered; and the parties have reached an amicable settlement and dismissed their appeal. The applicants for intervention here have in effect slept on their rights, and now they want this Court in effect to administer the motion picture industry in the distribution of motion pictures in Western Pennsylvania."

[fol. 462] Intervention was denied.

B. No Movant or Applicant Has Shown the "Interest" Required for Intervention.

Rule 24 requires that a would-be intervenor demonstrate at the outset an "interest" in the subject of the action. The commission and distributor movants and applicants allege the same general "interests", except for Paradox Production Corporation which has none at all (*infra* p. 18).

The state regulatory commissions each allege an "interest" in asserting the conflicting claims of gas consumers in their states regarding the New Company to be created by divestiture. The distributing companies also volunteer to protect the "interests" of their consumer customers and, of course, their own economic well being.

Such matters cannot prevail over *antitrust* requirements in this case. The Federal Power Commission held that the merger of Pacific Northwest into El Paso was supported by regulatory considerations of public convenience and

necessity. The Supreme Court did not disagree, but held, instead, in *California* v. *Federal Power Commission*, 369 U.S. 482 (1961), that such considerations give way to paramount antitrust policies under Section 7 of the Clayton Act. The approving regulatory determination of the Commission was therefore laid aside by the Supreme Court in order that the controlling *antitrust* questions might be determined.

[fol. 403] Compliance by this Court with the mandate of the Supreme Court for "divestiture without delay" should not be defeated by intrusion of collateral disputes between intervenors over questions irrelevant to the controlling requirements of the antitrust law.

This principle finds expression in an unbroken line of authorities. *Commonwealth Edison Co.* v. *Allis Chalmers Mfg. Co.*, 315 F2d 564 (7 Cir. 1963), *cert. den.* 375 U.S. 834, was an antitrust damage suit brought by Illinois public utilities companies against manufacturers of utility electrical equipment. Plaintiffs alleged that the defendants conspired to fix prices, allocate markets and the like, so that plaintiffs were overcharged for electrical equipment they purchased from defendants. The Attorney General of Illinois sought to intervene "in order to represent and protect the interests of the public consumers . . . who . . . were injured by defendants' price fixing conspiracies" (p. 566). Intervention was denied:

> "We hold that the State of Illinois as agent or parens patriae of the consumers (accepting arguendo that the State of Illinois can properly assume such role) or even the consumers themselves do not have any direct personal or pecuniary interest in these antitrust actions. Our holding renders moot any discussion of the existence of the subsumed secondary elements. The rationale for our holding follows.
>
> The interests of plaintiffs and the consumers are different and arise from separate though related operative facts. The legal interest of plaintiffs which they are attempting to vindicate in these actions arises

> under the federal antitrust statutes. The damages, if any, to which they are entitled are measured by the hurt they may have suffered by reason of the alleged conspiracies claimed to be violative of the antitrust laws. That hurt is measured by the excessive prices they claim were paid for equipment purchased from defendants. The alleged conspiracies spent themselves on these purchasers. The after effects of the hurt on [fol. 404] the consumers are consequential and too remote for the consumers to gain rights against the conspirators.
>
> The consumers' rights, if any, to reparation for their consequential hurt arise from higher rates and charges for services provided by plaintiffs. That is the proximate cause of their injury, not the antitrust violation. See Keogh v. C. & N. W. Ry. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922). *The consumers' rights do not penetrate through to the antitrust conspiracies.*"

This is well supported by Supreme Court authorities.

Pipeline Co. v. *United States*, 312 U.S. 502 (1941), was an action by the government to enjoin activities by defendant utilities alleged to have eliminated Panhandle Eastern Pipeline Company from competing for the Detroit market. A consent decree had been entered. It expressly permitted Panhandle Eastern to become a party to enforce specified rights given it by the decree. Upon reopening to modify the consent decree, Panhandle Eastern was held entitled to intervene under these decree provisions but not to have a sufficient interest to intervene under Rule 24.

In *Allen Co.* v. *Cash Register Co.*, 322 U.S. 137 (1944), National Cash Register Co. had earlier been enjoined from acquiring a competitor without approval of the Court. It petitioned for Court permission to acquire Allen Co. The government opposed and Allen itself sought to intervene. The intervention application was held properly denied because Allen would not be bound by the decision of National Cash Register's petition and had no interest in the

distribution or disposition of property in the Court's custody within the meaning of Rule 24. *Pipeline Co.* v. *United States* was distinguished as turning upon decree provisions entitling Panhandle Eastern to become a party. [fol. 405] *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), an offshoot of *United States* v. *Paramount Pictures*, 334 U.S. 131 (1948), is in point. After the Supreme Court decided the *Paramount* case, defendant Warner Brothers was ordered "reorganized" into two companies in a manner similar to divestiture. Sutphen Estates had leased property to a Warner affiliate and Warner had guaranteed the lessee's performance of the lease. The lessor sought to intervene to protect its rights against Warner as guarantor. It was held to have no right to do so because the lessor was not "a privy of Warner" and the "reorganization" decree would not bind the lessor in any legal sense. The Supreme Court recognized, however, that lessor had an interest in property subject to Court disposition within Rule 24 (a) (3). It rejected this "interest" as a basis for interference with *antitrust* relief by way of intervention in this language, which disposes of the motions and applications now before the Court (p. 22):

> ". . . it is the authority of the Court *under the Sherman Act* that sanctions and directs the reorganization."

The well-settled rule that paramount antitrust considerations cannot be defeated through intrusion of "interests" resting upon other grounds came to fruition in *Fox Publishing Co.* v. *United States*, 366 U.S. 683 (1961). The United States sued ASCAP to restrain practices allegedly injurious to competition for the artistic works of ASCAP members. After entry of a consent decree, certain publisher members of ASCAP sought to intervene in modification proceedings. The Court held they had no interest within Rule 24 (p. 689):

[fol. 406] "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."

The Court buttressed this conclusion with a warning that intervention ought not "to subvert":

". . . the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the government . . ." (p. 693).

See also the opinions in *United States* v. *duPont & Co.*, reported at 13 F.R.D. 487 (N.D. Ill. 1953) and 1962 Trade Cases, para. 70,245 (N.D. Ill. 1962), both denying stockholders' petitions to intervene brought at various stages of the case.

These authorities dispose of the contention that the applicants and movants here have an "interest" within Rule 24 entitling them to intervene and the related assertion that they would be "bound" by the final divestiture decree in the legal sense required by the Rule. We turn to the claim that the public interests the would-be intervenors have volunteered to represent are not adequately protected by the Department of Justice.

C. The Public Interest Is Adequately Represented By The Department of Justice.

Each movant and applicant claims, in one way or another, that its interests and the interests of the consumers it seeks to represent will not be adequately represented by the Department of Justice as counsel for the United States.

Analysis of this claim requires reiteration, at the outset, of what the controlling interests and issues *are* and what [fol. 407] they are not. In its first decision involving this

matter, *California* v. *Federal Power Commission*, 369 U.S. 482 (1961), the Supreme Court held, as we have seen, that *antitrust* requirements take precedence over and govern regulatory determinations by the Federal Power Commission of what the public convenience and necessity requires. The Department of Justice represents the United States here in giving effect to those controlling antitrust considerations delineated by the Supreme Court in its application of Section 7 of the Clayton Act to this case. The complaint of the eighteen state commissions and distributing companies seeking to intervene is not that the attorneys for the United States are inadequate to the antitrust task. The claim *is*, instead, that the United States Attorney and Department of Justice *will* give the precedence to antitrust requirements required by the Supreme Court and in the process neglect the conflicting conceptions of the would-be intervenors as to what the convenience and necessity of their consumers might otherwise dictate.[5]

We note in passing that the moving state commissions could not claim a right to intervene upon assertions of jurisdiction to regulate the activities of the New Company to be organized pursuant to El Paso's plan. The facilities the New Company will operate are interstate in nature, as were the facilities of Pacific Northwest, and the jurisdiction of the Federal Power Commission to regulate them [fol. 408] is exclusive [15 USC §717 (b); see *Panhandle Eastern Pipeline Co.* v. *P.S.C. of Indiana*, 332 U.S. 507 (1947), *F.P.C.* v. *Transcontinental Gas Corp.*, 365 U.S. 1 (1960), and authorities cited]. It is clear, in any event, that the regulatory process must take place in commission proceedings *after divestiture* upon rates and other matters with which this Court is not concerned. To intertwine anti-

[5] It is remarkable that one of the attorneys for California who protested the paramount importance of antitrust considerations before the Supreme Court in *California* v. *Federal Power Commission* now reverses his position and seeks to subvert antitrust considerations to other matters.

trust and regulatory interests would defeat the orderly accomplishment of both.

The proof of this pudding is in the position assumed here by the Federal Power Commission. It participates *amicus curiae* upon a statement which says the Commission has no wish to become a party. In this the Commission recognizes that it is for this Court to fashion a divestiture decree in conformity with the antitrust requirements of the Supreme Court's mandate and for the Commission, when divestiture has been effected, to concern itself with regulatory matters unrelated to the Court's duties in respect of Section 7. If the twenty applicants and movants here were entitled to intervene upon the grounds they allege, then every consumer of natural gas in the western United States would be similarly entitled upon like grounds, and performance by this Court of its duties prescribed by the Supreme Court mandate would become practically impossible. See, for example, *New York City* v. *New York Telephone*, 261 U.S. 312 (1923), and *In Re Engelhard*, 231 U.S. 646 (1914), denying telephone subscribers' petitions to intervene in actions relating to rates in which state commissions were parties.

The right and duty of the United States Attorney and Department of Justice to represent the United States, and [fol. 409] therefore the interests of all citizens, is statutory (28 USC §507). The Supreme Court has accordingly held, in *United States* v. *Paramount Pictures*, 334 U.S. 131, 177 (1948):

> "The complaint of the [would-be] intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these antitrust suits. So far as the protection of the public interest in free competition is concerned the interests of those intervenors was adequately represented."

D. Applicants Have No Interest In El Paso's Property Entitling Them To Intervene.

None of the would-be intervenors has an interest in the assets to be divested which would authorize intervention under subdivision (3) of Rule 24 (a). This statement from Moore accurately summarizes the authorities:

> "What kind of an interest must a petitioner have in property subject to the control of a Court before he can claim an absolute right to intervene? *Obviously it must be an interest known and protected by the law*: A claim of ownership, or a lesser interest sufficient and of the type to be denominated a lien equitable or legal." (4 Moore's Federal Practice, para. 24.09, p. 45).

See also the analysis in *Archer* v. *United States*, 268 F2d 687 (10 Cir. 1959).

The movants and applicants here plainly have no *legal* interest in El Paso's property. Nor do contracts between the distributors and El Paso for purchase and sale of gas vest any such interest in the moving distributing companies. It is not claimed, nor could it be, that these agreements give the distributors a *legal* interest in El Paso's gas supplies in the nature of a lien or otherwise. They have no interest respecting rates charged for gas purchased under the agreements because *rates will not be affected by* [fol. 410] *divestiture;* the New Company will continue the rates and other terms and conditions of service now in effect, and the Federal Power Commission will continue to regulate them.

In any event, *Sutphen Estates* v. *United States*, 342 U.S. 19 (1951), disposes of any claimed right to intervene in an antitrust case upon assertions of economic interest in property to be divested. As we have seen (supra p. 8), a lessor of property leased to a Warner Brothers subsidiary upon a lease guaranteed by Warner Brothers was denied intervention in an antitrust action in which Warner

Brothers had been ordered divided into two companies because (342 U.S. at 22):

> "... it is the authority of the Court under the Sherman Act that sanctions and directs the reorganization.",

and "administration of the decree" ordered by the Supreme Court was not to be "burdened with a collateral issue" (p. 23).

On this point, as on the others discussed above, most of the would-be intervenors have simply repeated the language of Rule 24 in support of a claimed right to intervene, without analysis or citation of other authority (*e.g.*, the "Statement" of California in support of its application, dated November 19, 1964). A few applicants (*e.g.*, Cascade Natural Gas Company in its memorandum served November 18, 1964) grapple with Sutphen Estates and other authorities upon which we rely in an effort to show that they are not inconsistent with intervention here. We submit this is unavailing and that there is no authority fairly supporting the motions and applications now before the Court.

Ford Motor Company v. *Bisane Bros.*, 249 F2d 22 (8 Cir. 1957), is heavily relied upon by the would-be intervenors who have undertaken to discuss authorities. It is [fol. 411] not in point. The case holds only that Ford Motor Company could intervene in an action brought by property owners to terminate service by the defendant railroad to Ford's plant. Whatever difficulties there may be in reconciling this opinion of the Eighth Circuit with the Supreme Court authorities, it is clear that the Ford case did not involve the antitrust laws or other public interests entrusted to lawyers already in the case, that the issues Ford wished to raise as intervenor were of the same kind as had arisen between the parties, and that Ford's application was not presented to the Court for the first time after judgment.

Certain of the state commissions (*e.g.*, Washington commission memorandum p. 11) rely upon *Securities Commis-*

sion v. *U. S. Realty Co.*, 310 U.S. 434 (1940), as declaring a principle which would allow them to intervene as public agencies without the interest required by Rule 24. The decision does not so hold. It decides only that the S.E.C. may intervene in Chapter XI Bankruptcy proceedings under circumstances peculiar to bankruptcy and otherwise different from those involved here. The Supreme Court based the right of the S.E.C. to intervene in Chapter XI proceedings in part upon its statutory right to intervene in proceedings under Chapter X and the General Orders in Bankruptcy; unlike the commission applicants here, the S.E.C. sought to raise the same bankruptcy issues as might have been raised between the parties. Finally, the S.E.C. sought to represent interests otherwise unrepresented in the bankruptcy case. In this case the Federal Power Commission participates as *amicus curiae* to be heard upon regulatory considerations deemed by it pertinent to the divestiture to be ordered by this Court. *The American* [fol. 412] *Realty Co.* case has nothing to do with intervention by a state regulatory commission to raise matters upon which a federal regulatory commission is already participating *amicus curiae.*[8]

III.

Permissive Intervention Should Be Denied.

In several of the decisions analyzed above with respect to intervention as a matter of right under Rule 24 (a), a companion claim to permissive intervention under Rule 24 (b) also was denied.

No different conclusion is warranted here. Rule 24 (b) authorizes permissive intervention: (1) when a statute

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[8] The related claim of the Oregon commission (Oregon commission memorandum p. 6) of a right to intervene as parens patriae of Oregon consumers is disposed of contrary to the commission's contentions by *Commonwealth Edison Co.* v. *Allis Chalmers Mfg. Co.*, 315 F2d 564 (7th Cir. 1963), *cert. den.* 375 U.S. 834, discussed supra p. 6.

confers a conditional right to intervene or (2) when the applicant's claim or defense and the main action have a question of law or fact in common. No statute confers any right, conditional or otherwise, to intervene here. No movant or applicant asserts any claim or defense on the merits at all because the merits have been finally decided. There is no question of fact or law the movants and applicants seek to raise in common with the antitrust matters which are the responsibility of the attorneys for the United States. On the contrary, as we have seen, the purpose of the would-be intervenors is to inject into these proceedings issues of regulatory convenience and necessity over which antitrust considerations are paramount.

[fol. 413] Rule 24 (b) also directs the Court, in determining whether to allow permissive intervention, to "consider whether the intervention will unduly delay or prejudice the adjudication" of issues between the parties. If the movants and applicants here were permitted to participate and try out the questions they seek to raise, the divestiture hearing probably would take longer to complete than the matters concluded in this litigation thus far. Intervention would make "divestiture without delay" a practical impossibility.

IV.

Other Matters Relating to California, Pacific Gas and Electric Company and Paradox Production Corporation

A. *California*

A remarkable circumstance which occurred after the hearing on October 19 last raises serious confusion regarding the authority of those who seek to intervene on behalf of the consumers of California. A "Special Attorney for the People of the State of California" filed an application to intervene dated July 20, 1964, and addressed the Court extensively at the October 19 hearing (Tr. 75, *et seq.*). After that hearing the Public Utilities Commission of California

filed a motion to intervene dated November 16, 1964, over the signature of its Chief Counsel. It, too, claims authority to represent California consumers.

There is more, however, than confusion as to who is counsel for California. The statement of its "Special Attorney" and the motion of the Chief Counsel of its Public Utilities Commission are not consistent. The Special Attorney raises a series of questions regarding, and in fact appears to oppose, El Paso's divestiture plan. The [fol. 414] California commission, on the other hand, appears to take no position on El Paso's plan, but seeks simply to represent the interests of California consumers upon whatever questions might arise.

B. *Pacific Gas and Electric Company*

The motion of Pacific Gas and Electric Company to intervene dated November 17, 1964, asserts the astonishing proposition that this Court lacks jurisdiction to prescribe details of the divestiture required by the mandate of the Supreme Court. P.G. and E. contends that this Court should abdicate to the Federal Power Commission on a host of matters which must be resolved to effect divestiture.[1] Although its motion cites in *California* v. *Federal Power Commission*, 369 U.S. 482 (1962), P.G. and E. appears to overlook the essential holding of the Supreme Court in that opinion, viz., that in this action preservation of the competition required by *the antitrust laws* is the paramount and governing consideration.

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[1] The Commission took no such position in its statement to the Court as *amicus curiae* on October 19 (Tr. 73, 74). The Washington commission, which is dissatisfied with El Paso's plan, also takes a different and correct position. In its memorandum served November 23, 1964, the Washington commission asserts (p. 4) that "it is within the jurisdiction of this court, not the Federal Power Commission, by its decree of divestiture to determine what shall be the capital structure, the balance sheet, the investment, the gas supply and other factors" relating to the New Company and essential to divestiture. The Oregon commission, in its memorandum served the same day, agrees (pp. 5, 9).

We submit that P.G. and E.'s motion, stripped to its bare essentials, proposes that P.G. and E. be made a party in order that it may contend that the Court lacks power to fashion the decree required by the mandate of the Supreme Court. This is itself a sufficient basis for denial.

[fol. 415] C. *Paradox Production Corporation*

As a would-be purchaser of the assets to be divested, this applicant has no interest in the action, El Paso's property or the divestiture decree. Our research has understandably failed to disclose any reported decision dealing with this type of claim to a right to intervene.

Recognizing that it has no interest within Rule 24 of any kind, Paradox, in its memorandum served on November 20, 1964, takes issue with El Paso's proposal to distribute stock in the New Company to El Paso's shareholders. This complaint, utterly unsupported by the authority Paradox cites,[a] is nothing more than a transparent effort to establish the curious proposition that the interests of the stockholders of Paradox are paramount to the antitrust requirements on which the mandate of the Supreme Court is based.

Conclusion

El Paso submits that each of the applications and motions to intervene should be denied.

Respectfully submitted,

Gregory A. Harrison, Robert S. Daggett, Brobeck, Phleger & Harrison, Van Cott, Bagley, Cornwall & McCarthy, By Robert S. Daggett.

[fol. 416]

[fol. 416] Certificate of Service (omitted in printing).

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[a] *United States* v. *duPont*, 366 U.S. 316 (1960), final decree on remand reported in 1962 Trade Cases, para. 70,245 (N.D. Ill. 1962).

[fol. 417]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

C 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants,

STATE OF OREGON, ex rel. PUBLIC UTILITY COMMISSIONER OF OREGON, Intervenor.

MEMORANDUM

MEMORANDUM IN SUPPORT OF INTERVENTION OF THE STATE OF OREGON EX REL. PUBLIC UTILITY COMMISSIONER OF OREGON—Filed November 25, 1964

I

Status of Proceedings

On April 6, 1964, the Supreme Court of the United States determined that the acquisition of the Pacific Northwest Pipeline Corporation by the El Paso Natural Gas Company constituted a violation of the antitrust laws of the United States. The mandate of the Supreme Court was returned to the above-entitled court on or about May 5, 1964, and the Application for Leave to Intervene of the State of Oregon ex rel. Public Utility Commissioner of Oregon was filed with the court on or about May 12, 1964.

[File endorsement omitted]

Thereafter, on July 8, 1964, a hearing was held in the above matter on proposals for divestiture pursuant to the aforementioned mandate. There being then no proposals made for the consideration of the court, the matter was [fol. 418] continued. Further hearing was held on October 19, 1964, upon proposals for divestiture and upon various motions and applications for intervention including that of the State of Oregon, the court then and there hearing certain proposals and testimony in support thereof adduced on behalf of the El Paso Natural Gas Company and arguments in support of the intervention of certain applicants for intervention. The court then continued the matter for further hearings and granted prospective intervenors the privilege of filing with the court memoranda in support of their respective positions. This memorandum is submitted in accordance with the privilege so afforded.

II

The State of Oregon Is Entitled to Intervene Under the Provisions of Rule 24 of the Federal Rules of Civil Procedure

Rule 24 (a) provides that anyone, upon timely application, *shall* be permitted to intervene in an action "(2) when the representation of an applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

Upon the question of timeliness, Oregon, as above noted, filed its application to intervene a week following the return of the Supreme Court mandate. The proceedings following the return of the mandate constitute a new proceeding (see p. 52 of the October 19, 1964, transcript herein where the court notes: "This is a brand-new pro-

ceeding as far as I am concerned, . . . "). The issues of the [fol. 419] original proceeding involved questions going to the problem of whether or not an antitrust violation had occurred. Those issues are no longer in the case, having been finally resolved. The pending issue is, simply stated, how can divestiture most equitably be accomplished? That issue is quite obviously "brand-new" having come before the court upon the return of the Supreme Court's mandate. Accordingly, Oregon's application, one week after the return of the mandate, is timely since it was promptly filed and was filed five months prior to the time El Paso had framed and presented to the court its plan for divestiture.

Oregon's application, although timely, must in other respects come within the scope of Rule 24 (a) in order that Oregon may claim a right of intervention. It is entitled to intervene under both subsections 2 and 3 above set forth. Under 2 Oregon's intervention is of right because no existing party will adequately represent Oregon and Oregon will be bound by a decree of divestiture herein.

It is quite obvious that El Paso will not represent Oregon's interests, and no good purpose will be served by going into detail on that subject. Paragraph V et seq. of this memorandum detail certain of the areas wherein Oregon and El Paso are in direct conflict with respect to certain aspects of divestiture. Those differences should serve to illustrate that El Paso does not and will not represent Oregon's interests.

Unfortunately the Justice Department's representation of Oregon's interest is not adequate. The various points set forth hereafter wherein Oregon disputes the equity and propriety of the El Paso proposal have all been fully disclosed to the Justice Department by letter and orally. That disclosure, however, is no guarantee that the Justice [fol. 420] Department will press those points before the court and, more importantly in terms of Rule 24, the Justice Department is *not* bound in any way to press or even consider the position and contentions of the State of Ore-

gon. It follows that Justice's representation of Oregon's interests at very best "may be inadequate."

That Justice's representation is *not* adequate is demonstrable in terms of the laws of the State of Oregon. The Oregon Revised Statutes (ORS) provide that the Public Utility Commissioner "shall represent the patrons and users of the service and consumers of the product of any public utility, . . ." ORS 756.040. The Justice Department is not charged with that duty. It is, in terms of this case, obliged to preserve competition between regulated utilities and *not* to protect the interests of those who will be served by those same utilities. It is important to note that at an earlier state of these proceedings the Federal Power Commission, charged by Congress to protect the public interest, approved the merger as in the public interest which the Supreme Court subsequently struck down as unlawful. Plainly, then, competition is but one aspect of this case. We deem Justice to be competent to protect that aspect, but all other aspects are peculiarly without the sphere of Justice's competence and authority and peculiarly within that of the Federal Power Commission and the regulatory authorities of the affected states.

Oregon will be bound by the decree of this court. The public utility to be created by an order of the court will provide all of the natural gas served within the state. As noted, public utilities are regulated by Oregon save only those which are regulated by the Federal Power Commission. Those local utilities dependent on the new interstate [fol. 421] company are, of course, within the regulatory jurisdiction of the states within which they serve. The interstate transmission company, the "new company" in El Paso terminology, will be subject to the jurisdiction of the Federal Power Commission. Normally a state commission may initiate before the FPC appropriate proceedings in the event fault is found with the rates or practices of a company subject to FPC jurisdiction. However, in the case at bar, the decree of the court will necessarily fore-

close inquiry before the FPC with respect to most aspects of the operations of the new company since the financial structure of the company will be predetermined and the assets of the company delineated by court. The FPC will thus be limited in all future proceedings to those considerations which are based upon a factual situation predetermined by the court. Oregon (and all states) as well as the FPC will be finally foreclosed (or bound) by the court's disposition of the property subject to its control from inquiring into the equity and propriety of the court's disposition of the many serious issues involved in this proceeding unless intervention in and participation as parties in this proceeding is allowed.

From the foregoing remarks with respect to Oregon's right to intervene under the provisions of Rule 24 (a)(2), it is clear that Oregon is entitled to intervene under the provisions of Rule 24 (a)(3) as well, since Oregon is clearly in a position to be adversely affected by the disposition of the property which is subject to disposition by the court.

That Oregon "is so situated" is manifest, since Oregon is wholly dependent upon the new company which will be created upon divestiture for *all* of the natural gas consumed within the state. An inadequacy of gas reserves, an inability to finance necessary additional facilities or [fol. 422] acquire additional reserves as needed may have damaging and far-reaching consequences in terms of available service and rates in Oregon.

There is a paucity of authority with respect to the right of a state to intervene in a proceeding of this nature. We have found no cases which present an exact parallel to the case at bar. There are some cases, however, which present useful guidelines. In People of the State of California v. United States (1950) 180 F2d 596, the State of California claims a right to intervene in a proceeding on two bases, ownership of the res and as *parens patriae*. Intervention in the lower court was denied. On appeal to the Circuit Court:

> "... The State of California is entitled to intervene as of right on each of the claimed grounds, not only

in its proprietary capacity as asserted absolute owner of the water in suit, but also in its capacity as *parens patriae*."

Oregon does not claim a proprietary interest in the res herein but does have a similar right, that is, the right of continued reliable service at reasonable rates under the jurisdiction of the Federal Power Commission, before which body Oregon has an absolute right to intervene in matters affecting what Oregon deems to be its interests. As noted, the power the FPC will be circumscribed by any order of this court (in that connection see Clackamas County, Ore. v. McKay (1955) 219 F2d 479, vacated 75 S Ct 599, 349 US 909, 99 L ed 1244, a recent case in the long line of cases stemming from Marbury v. Madison). Oregon does of course seek intervention as *parens patriae* which it is entitled to do according to the foregoing language as a matter of right.

The above case, California v. U. S., quotes from Percy Summer Club v. Astle (C.C.N.H. 1901) 110 F 486, 488 as follows:

> "It would be especially unbecoming for the federal courts to pass on a great question in which a sovereign [fol. 423] state of the Union has a direct interest, if not as lord paramount, at least as representing all its citizens, without affording it an opportunity to be heard before the legal proceedings in which the question is involved are concluded."

The foregoing appears to be altogether appropriate in the instant case insofar as Oregon is a "sovereign state of the Union" and "has a direct interest . . . at least as representing all its citizens."

A more recent case involving a state is Mitchell v. Singstad (1959) 23 F.R.D. 62 wherein the State Roads Commission of Maryland sought intervention. The court in that case found that the state's interests would be adequately represented. Therefore:

> "Grounds for intervention under a literal interpretation of Rule 24 (a) or (b) F.R. Civ. P., 28 U.S.C.A. do not exist. However, where the public interest is clear, courts permit a state or a federal agency to intervene, as parens patriae or other grounds. [citing cases]."

The State of Maryland, then, was permitted to intervene in litigation involving a federal agency, Secretary of Labor, and a private litigant to protect the interest of the people of the state even in a situation where the court deemed it already adequately represented. In the case at bar Oregon is not adequately represented, as above noted, since its interests radically diverge from those of the present parties.

III

Permissive Intervention

Under Rule 24 (b)(2) intervention is permissive "when an applicant's claim or defense and the main action have a question of law or fact in common."

Oregon has a right to intervene. Some discord with respect to this statement is, however, to be anticipated, and with that in mind, we here point out that had Oregon no ab- [fol. 424] solute right to intervene, then certainly it would be an abuse of discretion to reject Oregon's application to intervene in light of Rule 24 (b)(2) since Oregon's position ("claim or defense") and the main action have *identical* questions of law and fact, not just a question in common, that is, the question here is how to effect a divestiture. All parties and all of those seeking intervention have that in common.

It is not here our purpose to argue the applications of others seeking intervention. However, as above noted all do have a single question in common. The allowance of intervention will not unnecessarily broaden the scope of that question, and certainly cannot run counter to the pro-

visions of the antitrust laws under which the suit was brought.

In short, the court should allow the intervention of Oregon under Rule 24 (b)(2) if it does not do so under Rule 24 (a).

IV

Function of the Federal Power Commission

This topic has already been discussed in some detail, and treatment here will be accordingly abbreviated.

There is virtually no case law setting forth the function of the FPC after a divestiture decree. The amicus curiae statement of the FPC sets forth the FPC notion of appropriate procedure. The general principle of court and agency relationships is found in Marbury v. Madison, above mentioned, and is simply that when the court acts, the duties of the agency become ministerial, that is, the court having exercised its discretion, none remains to the agency. Yet it is clear that Congress intended that the FPC exercise regulatory jurisdiction over interstate gas transmission companies, not the courts. This proceeding is an [fol. 425] exception, we now know. In matters involving the Clayton Act, a company which fails to strictly adhere to the exemption provisions of 15 U.S.C. 18 finds itself subject to court jurisdiction thereafter, and the agency which is the guardian of the public interest must pursue a course which it has previously deemed less in the public interest than the course followed which has resulted in sanction. The result is that the court is now compelled to exercise its jurisdiction in a highly complex and technical area, and to direct the course which the agency must follow, the very agency which is thoroughly competent to deal with that complex and technical area and in the usual course of events does just that.

Our understanding of the situation compels us to the conclusion that the court must make a final determination in this matter leaving little if any discretion to the FPC.

Procedurally, the matter must then go to the FPC under § 7 of the Natural Gas Act, but we do not think the FPC can act other than in accordance with the court's direction even in a § 7 proceeding.

In short, the FPC will have little, if any, discretion. It's function will be ministerial. As previously noted, Oregon will be a party before the FPC as a matter of right. That status gives Oregon little solace where no discretion remains with the FPC. It is, therefore, imperative that Oregon present its case to the tribunal having discretion. That tribunal can only be this court.

V

The Position of Oregon in the Divestiture Proceedings

It is Oregon's position that there are two basic areas of inquiry in these proceedings. First, it is of greatest importance that *no definitive orders be entered* in these [fol. 426] proceedings until a *management of demonstrable independence and competence* has been selected and that management has had sufficient *time* to acquire a competent technical staff and examine fully and freely into the factual and technical aspects of the divestiture proposal now before the court.

It is plain that at this state of the proceedings El Paso has no one to bargain with. The contracts it has proposed do not represent a "meeting of the minds," they are one-sided and must necessarily be so. The Department of Justice cannot make contracts for a nonexistent entity, nor can any applicant for intervention, including Oregon. It is therefore *imperative* that no orders be entered until there is representation on the part of the new company.

The second basic area of inquiry is with respect to specific failings in the proposed El Paso plan. We will necessarily devote considerable space to this second area, yet it is the first, independent management with a free hand and adequate time, which is of even greater concern than the second area, for if such management is created, and

it is not bound to operate within the framework of restrictive court orders, then it is our view that the specific problems involved in divestiture will in all probability be resolved between the managements of the two companies on a reasonable basis and without the need of extended legal proceedings. We ask that this be borne in mind in connection with the paragraphs following which deal with various of the defects in the El Paso proposal.

VI

Under the El Paso Divestiture Plan Inadequate Reserves Would Be Transferred to the New Company as a Matter of Law

El Paso proposes to return exactly the same San Juan [fol. 427] Basin reserves to the new company which El Paso acquired through the 1957 stock acquisition. At first blush this might seem appropriate. However, it is in fact most inappropriate. The San Juan Basin is closer to the California market than any other large block of natural gas reserves. If the new company is to compete, or constitute a competitive factor, for a part of the California market, it must have, as a practical matter, substantial San Juan reserves to support a California project. El Paso has continued to acquire reserves in the San Juan Basin since the merger. *None* of these are assigned to the new company. On the contrary, the new company would have *less* reserves than did Pacific Northwest, since under the El Paso plan the new company would not have any additional reserves over the 1957 level to make up for depletion of Pacific reserves since 1957.

In short, if the status quo is to be restored, and if competition in California is to be anything more than a myth, then the new company should have a pro rata share of San Juan Basin reserves added to the El Paso system since 1957 in order that the new company will be in the same position in relation to El Paso that Pacific was at the time of the merger.

VII

The Kingsgate Agreements Between Pacific and El Paso Should Be Restored

When Kingsgate gas was put into the Pacific and El Paso systems, El Paso had already acquired the stock of Pacific. At the time, however, agreements were entered into between the two companies which in effect provided that El Paso would take the gas from the Pacific Gas Transmission Company and deliver it to Pacific at a point near Spokane, Washington. Pacific would then use so much of the gas (150,000,000 cubic feet per day) as it needed to meet its system requirements and turn over the balance [fol. 428] to El Paso in the San Juan Basin.

While El Paso insists that the agreements with respect to that gas were not contracts at all since El Paso held Pacific's stock, the agreements were presented to the Federal Power Commission and were the basis upon which the FPC allowed importation of the gas from Canada. They therefore constitute the closest thing to the status quo available and should be restored on that basis.

There are additional reasons why the Kingsgate agreements should be restored. Under the El Paso plan, the Kingsgate gas would be force-fed into the new company system in increasing amounts over a five-year period, until at the end of the five-year period the new company would be obligated to take no less than 90% of the 150,000 Mcf per day or be subject to penalty provisions. During that five-year period, the new company would have little or no incentive to seek new gas, since its requirements would be principally met from the Kingsgate supply. In other words, a requirement that the new company take the Kingsgate gas as proposed by El Paso would leave the new company no room for choice as to sources of supply and would seriously inhibit exploration activities leaving El Paso free to tie up more San Juan reserves without competition from the new company.

Another adverse factor in the El Paso plan is that the new company would be tied to rigid sources of supply. It would have to take 300,000,000 cubic feet of Canadian gas at Sumas, Washington, at 90% load factor (100,000,000 cubic feet to be redelivered to El Paso in the San Juan Basin) and, after five years, 150,000,000 cubic feet of Canadian gas from Kingsgate each day at a 90% load factor. While during peak or near peak periods of consumption the new company could absorb such quantities, it would [fol. 429] not do so at periods of low consumption except by seriously curtailing its gas takes from domestic sources. Since load factors also attach to domestic contracts, it follows that the new company will be in a difficult situation with respect to its supply situation on a system basis. This situation would be substantially alleviated by restoration of the pre-asset merger Kingsgate agreements.

VIII

El Paso Should Not Be Permitted to Vary the San Juan Basin Gathering Charges

El Paso proposes a new contract covering San Juan Basin gathering charges which would more than triple those charges. It constitutes, therefore, a very substantial departure from the pre-merger status quo and should not be allowed.

Let us first consider the function of the Federal Power Commission. Under the provisions of the Natural Gas Act, 15 USC § 717, the Congress empowered the FPC to regulate rates and charges, including intercompany rates and charges. Pacific and El Paso entered into an agreement whereby a charge of 1.375¢ per Mcf was established as the charge each company would pay the other for gathering gas through the other's facilities. Presumably that charge was reasonable, but importantly, neither could unilaterally alter that charge, *nor could it be altered without the approval of the FPC.*

El Paso now has no one to bargain with (in the usual sense of the word) with respect to the gathering charges. Yet it proposes to *unilaterally* and *without* approval of the FPC triple the charge to 4½¢ per Mcf.

In subsequent proceedings the management of the new company may go to the FPC and initiate proceedings for the purpose of inquiring into the reasonableness of the 4½¢ charge, but this is *not warranted* procedure. *The* [fol. 430] *court should not be forced into the position of unnecessarily substituting itself for the FPC,* an agency with a staff specially trained and equipped to inquire into such matters. Neither should the court be forced into aiding and abetting El Paso's side-stepping of the jurisdiction of the FPC.

The proper and orderly procedure is plain and clear. The approved 1.375¢ Mcf charge should be re-established. El Paso then would be free to initiate the appropriate proceedings before the FPC to vary the charge should it deem the 1.375¢ charge to be inadequate, all in accordance with the intendment of the Natural Gas Act.

There is no good purpose to be served by here analyzing the over-all cost differential which the proposed increase in carrying charges will entail with respect to the new company or the financial impact on the new company occasioned thereby. Suffice it to say that such concerns are FPC and not judicial concerns at this stage of the proceedings.

IX

El Paso Should Be Required to Transfer the Stock of the Westcoast Transmission Company to the New Company

When El Paso acquired Pacific Northwest, it was Pacific, not El Paso, which owned the Westcoast stock. That stock now has a value of approximately $17 million and obviously constitutes a valuable asset. When the Supreme Court determined that El Paso must divest itself of the assets of Pacific, it did not delineate specifically the manner

of divestiture, and El Paso by its proposal to sell this stock seems to take the position that the various assets held by Pacific should be sold "piece-meal" and ownership spread to the four winds. Such a method would be inconsistent with the intent of the Supreme Court and the concept of the Clayton Act, which are to *preserve competition.* To *preserve* competition requires that the *status quo ante* be [fol. 431] restored to the extent that is possible. It would simply serve to abort the high purposes of the Act and the court if, through divestiture, the competitive forces were to be destroyed which were intended to be preserved through divestiture.

The Westcoast stock value will be reflected in the value of the stock of the new company, and the El Paso stockholders will accordingly receive full value for the stock whether El Paso sells it or transfers it.

On the other hand, the stock has a unique value to the new company. As previously noted, the new company will be heavily dependent on Canadian gas in future years, and clearly the most readily available Canadian reserves are those to which Westcoast is attached in British Columbia and Alberta. It is extremely important that Pacific have some voice in the councils of Westcoast. The stock of Westcoast will provide its owner with that voice. Such is its unique value, and that value will *not* inure to El Paso should the court permit El Paso to sell the stock rather than transferring it to the new company.

In addition to considerations with respect to restoration of the status quo, another question of very real importance arises in connection with the financial structure of the new company as proposed by El Paso—*it has no working capital.* It must resort immediately to the money market in order to meet even its first payroll. This is plainly no way to commence business. However, should the new company have in hand the stock of Westcoast, it will have a tangible asset which it can sell or pledge for the purpose of securing working capital.

It may develop that economic considerations will require that the Westcoast stock be sold after its transfer to the [fol. 432] new company. This is not the issue. The issue is whether the new company management should make that determination in light of its own interest or whether El Paso should be allowed to make that determination without regard to the restoration of the status quo.

X

Northwest Production Company Should Not Be Merged Into the New Company

This point is an exception to the point made in paragraph V with respect to the necessity of an independent management for the new company. The court in this connection must protect the public from overreaching by El Paso *and* the new company.

First, please note the stark contrast between the treatment El Paso proposes for the Westcoast Transmission Company stock and the Northwest Production stock. It would sell the Westcoast stock. It would bury the Production stock. Why? Apparently the Westcoast stock is viewed as cash in hand and no particular value would be derived in transferring it to the new company. Apparently that is not the case with the Production Company stock which is to disappear entirely. The reason for this is not clear, but we believe that logic will supply the answers which El Paso has not supplied.

A production company may earn on its investment without regulation. Its earnings to date have been limited only to the extent of the ultimate price charged to a regulated utility. Hypothetically, if a production company can produce gas for 5¢ and sell for 14¢, then, only the 14¢ is regulated, and the FPC looks only to the 14¢, not the 5¢. If the production company's cost is 20¢, the 14¢ is still the same, however, and in the first instance, there are earnings, [fol. 433] in the second instance losses.

If a company is in a profit position, it follows that management would seek to maintain the company as an independent, but if in a loss position, it follows that the company should be merged. Why? If merged, then the assets are taken in by the regulated transmission company and that company earns a return on investment. Thus the company with 20¢ production costs no longer receives the "area price" or "in-line" price of 14¢. It receives its expenses plus a return on investment from the consumer, and the losing proposition is made to yield a return. This obviously enhances the value of the assets of the company which would lose money if independent. The logical conclusion in this instance is that El Paso is attempting to increase the value of Northwest by merging it into the new company, all for the benefit of El Paso and at the expense of the consumer.

One further point should be noted at this juncture. Such a merger, if attempted by the new company after divestiture, would fall within the regulatory jurisdiction of the FPC. In effecting the merger before the new company is subject to FPC jurisdiction, the function of the FPC is sidestepped. It is unconscionable for El Paso to attempt to use the court as a pawn in its efforts to avoid the plainly applicable provisions of the Natural Gas Act (15 USCA § 717f).

XI

El Paso Should Be Required to Divest the Value of the Tax Loss Carryover Acquired in the Merger

At the time of the merger of El Paso and Pacific, Pacific had an accumulated tax loss of great value to El Paso. When El Paso acquired Pacific's stock, the loss amounted to more than $23,000,000. At the time of the merger of assets, the loss amounted to over $53,000,000. It is well to [fol. 434] note at this point that much of the tax loss was generated through the use of liberalized depreciation, the cumulative difference between liberalized depreciation and

straight-line depreciation at the time of the merger being over $19,000,000. This last-mentioned amount will, because taken early for the benefit of El Paso, have to be repaid to the extent taxable by the new company in the future. The El Paso divestiture proposal under Tab 11 indicates that the future liability now stands at $20,065,382, and a reserve is established to that extent. No provision is made, however, for the divestiture of the remaining portion of the tax loss, that is, over $33,000,000. Of that amount, El Paso was able to retain 52% by reason of El Paso's use of it as a tax deduction, that is, in excess of $17,000,000. Provision should be made for divestiture of that benefit to give full countenance to the Supreme Court's order which contemplated divestiture of *all* assets illegally acquired.

XII

Summary

Oregon is entitled to intervene herein under the provisions of both Rule 24 (a)(2) and Rule 24 (a)(3) of the Federal Rules of Civil Procedure. Even if not allowed to intervene under those provisions, it should be allowed to intervene under Rule 24 (b)(2) not only because its position has common questions of law and fact with the main action, but because of the novelty of the proceedings herein, which in the ordinary course of events would be before the appropriate regulatory body, the Federal Power Commission, before which party Oregon would be a party of right. To foreclose Oregon from participation herein is in effect to foreclose it from all effective participation due to the very limited jurisdiction which will remain to the FPC following a divestiture order of this court. Such [fol. 435] foreclosure would be altogether inconsistent with the classical position of states as *parens patriae*, and the concept, expressed in the Natural Gas Act and the rules of the FPC, that states should be heard in matters which have a substantial interest to them and their citizenry and

in particular matters relating to the rates and practices of natural gas producers and suppliers.

Oregon should be afforded the opportunity to point out to the court on the record herein the absolute necessity of establishing an independent management, a management without financial ties or ties of loyalty to El Paso, a management capable of bargaining with El Paso with respect to the many infirmities of the plan proposed by El Paso, *all prior to the entry of a definitive order which would narrow the scope of inquiry of such management.*

Oregon further should be allowed to intervene in order that it may protect its citizens with respect to the various defects in the El Paso proposal which have been above set forth.

Respectfully submitted,

Robert Y. Thornton, Attorney General, By Richard W. Sabin, Assistant Attorney General Assigned to the Public Utility Commissioner of Oregon, 103 Public Service Building, Salem, Oregon 97310, Telephone 364-2171—Ext 615.

Local Counsel: Calvin L. Rampton, Esq., El Paso Natural Gas Building, Salt Lake City, Utah.

[fol. 436] Certificate of Service (omitted in printing).

[fol. 438]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

No. C 143-57

UNITED STATES OF AMERICA, Plaintiff,

vs.

EL PASO NATURAL GAS COMPANY and PACIFIC NORTHWEST PIPELINE CORPORATION, Defendants.

MEMORANDUM BRIEF IN SUPPORT OF THE APPLICATION OF THE PUBLIC SERVICE COMMISSION OF WYOMING FOR LEAVE TO INTERVENE AND PETITION TO AMEND ITS SAID APPLICATION —Filed December 2, 1964

Petition

The Wyoming Public Service Commission by and through A. Fred Miller, Special Assistant Attorney General for the State of Wyoming, hereby asks leave to amend its Application to Intervene in the above captioned matter to include an Application to appear as Amicus Curiae if its said Application is denied and any other applications to intervene are allowed in this divestiture proceeding other than the Federal Power Commission and the Attorney General of the United States. We hereby refer to our said Application for Leave to Intervene and by such reference incorporate the matter therein contained herein.

Memorandum Brief

According to Rule 24 of the Federal Rules of Civil Procedure, there are two types of intervention, i.e. as a matter

[File endorsement omitted]

of right (Rule 24[a]) and permissive intervention (Rule [fol. 439] 24[b]). One may intervene as a matter of right: (1) when a statute of the United States confers an unconditional right to intervene; (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; and (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or any officer thereof.

One may intervene permissively: (1) when a statute of the United States confers a conditional right to intervene or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

The State of Wyoming finds itself in a rather peculiar and difficult situation in that we believe the law to be clear that no one of which we are aware or informed is a proper intervener in this divestiture proceeding, including the Public Service Commission of the State of Wyoming. Without intending to be patronizing, it would seem that this court properly analyzed the situation herein as shown by the transcript of the October 19, 1964 hearing, i.e. the only question involved herein is how El Paso Natural Gas Company, hereinafter referred to as El Paso, should divest itself of certain assets so as to eliminate the anti-competitive factor which the Supreme Court of the United States found to exist, and in this connection the only proper parties are El Paso, the Justice Department of the United States, the Federal Power Commission, and this Court. Accordingly, there can be no questions of law or fact which would permit permissive intervention, except for collateral issues which may be interjected if such intervention were permitted, as is discussed hereinafter. In the case of *Commonwealth Edison Company* v. *Allis-Chalmers Mfg.* [fol. 440] *Co.*, 315 F.2d 565 (1963) which involved anti-trust suits charging the defendant electrical equipment manufacturer with conspiracy to fix prices, allocate markets and

submit collusive bids in sale of electrical equipment to plaintiffs, and in which the Attorney General of Illinois sought to intervene, the United States Circuit Court of Appeals of the Seventh Circuit, made the following statement with reference to permissive intervention on page 567:

> "We find no abuse of discretion in the district court's denial of the State of Illinois' motion for permissive intervention as a purchaser of defendants' products that has suffered damage by reason of the alleged conspiracies. In support of its motion to intervene, the State claims common issues of law and fact. As stated by the district judge in his memorandum, 'While it is apparent that the State's claim as to the issue of conspiracy will present questions of law and fact in common with the main actions, this is not true as to the question of damages.'
>
> "The State may start an independent action against defendants if it chooses. * * * ."

There have been two cases of rather recent date which have allowed the State to intervene on the grounds of parens patriae. In *People of the State of California* v. *United States,* U.S. Court of Appeal for the Ninth Circuit, February 6, 1950, as found at 180 F.2d 596, the court permitted the State of California to intervene in a quiet title action involving water. This case is easily distinguished from the situation herein in that the constitution of the State of California made all water the property and subject to the control of the State. An intrastate stream was involved and the Plaintiff, the United States, was seeking to divert the water of this intrastate stream for the production of electricity to be used away from the State of California for the use and benefit of another State. The State of California had no other substitute for this water. It should also be pointed out that there was no agency such [fol. 441] as the Federal Power Commission or the Justice Department of the United States to represent the interests

of California since the United States was a Plaintiff in the action and sought to gain title to the water. Even then, there was a very strong and persuasive dissenting opinion in this case. The matter therein stated is of particular interest to us herein. Judge Pope pointed out that if California were permitted to intervene certain issues involving the equities between the States of California and Nevada would have to be determined. In this event the District Court would not have jurisdiction. On page 606 of the Federal Reporter, Judge Pope stated that the well-known law concerning jurisdiction, to-wit:

> "Under Article 3, Section 2, clause 2 of the (United States) Constitution it is stated that the Supreme Court shall have original jurisdiction 'in all Cases * * * in which a State shall be Party.' Title 28 U.S.C.A. § 1251(a)(1) provides that: 'The Supreme Court shall have original and *exclusive* jurisdiction of: (1) All controversies between two or more States.' (emphasis supplied.)"

In this connection, Judge Pope pointed out that if these equitable issues arose then Nevada would become an indispensable party to the suit. This same rationale is applicable to these proceedings. If any one of the States which seek to intervene herein are permitted to do so, then since all are interested in similar ways, conflicting equities will arise. Consequently, the other States which are in any way affected by either El Paso or the proposed new company, must then be made parties to the proceeding. Then this court would have no jurisdiction. Notwithstanding the foregoing we still submit that these issues are collateral to the issues to be decided herein and are specifically within the jurisdiction of the Federal Power Commission, as is discussed hereinafter.

[fol. 442] In the other case entitled *Mitchell* v. *Singstad*, 23 F.R.D. 62, the United States District Court in Maryland permitted the State of Maryland to intervene in the action

under the Fair Labor Standards Act for injunctive relief in a suit which involved a contractor with the State of Maryland. The court did not state on what grounds it permitted the intervention but as obiter dictum stated as follows on page 64:

> "Grounds for intervention under a literal interpretation of Rule 24(a) or (b), F.R.Civ.P., 28 U.S.C.A. do not exist. However, where the public interest is clear, courts permit a state or a federal agency to intervene, as parens patriae or other grounds. *Securities and Exchange Comm.* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 459, 460, 60 S.Ct. 1044, 84 L.Ed. 1293, and cases cited; *People of State of California* v. *United States*, 9 Cir., 180 F.2d 596, 601; XVIII N.Y.U. L.A. Rev. 148-150. Intervention by private groups has been permitted in unusual cases where the public interest was sufficiently imperative. *Textile Workers Union of America* v. *Allendale Co.*, 96 US App. DC 401, 226 F.2d 765. Admittedly there is strong authority to the contrary, but the decision in each case must be made on its own merits, in the light of the dominant purpose of the Federal Rules of Civil Procedure—to secure the just determination of every action. Rule 1."

When considering the particular facts of that case it would seem that the same could be distinguished from these proceedings because the State of Maryland had a direct contractual or proprietary interest. Further, it will be noted that the permission to intervene was specifically limited and conditioned on the issues not being broadened. The proposed interveners herein would seem to enlarge upon the aforementioned issue of the anti-competitive factor, vel non. Illustrative of the issues which would be interjected are the following: (1) favorable economic climate for natural gas consumers; (2) favorable economic climate for natural gas producers and distributors; (3) the relative financial strength of El Paso Natural Gas Company

now as compared with its economic strength before its merger with Pacific Northwest Pipeline Corporation; (4) [fol. 443] how much the divestiture plan would benefit El Paso, etc.

We submit that neither the applicant States nor the applicant gas companies should have any say in how the divestiture is effected or in the managerial affairs of El Paso of the proposed new company and that such issues as are set forth hereinabove are uniquely within the jurisdiction of this Court at this time. (Section 7, Natural Gas Act). We cite the court to the following language from the case entitled *United States* v. *Columbia Gas and Electric Corporation*, 28 F.Supp. 168, 170:

> "The motions of both cities for orders granting them leave to intervene as parties defendant in this suit expressly state that their motions are based upon allegations in the annexed complaints. A reading of the complaints shows that the gravamen of each complaint is rates or charges for natural gas paid or to be paid by the users thereof. Gas rates, present and future, *are outside the scope of the issues raised by the Government's supplemental complaint. To be entitled to permissive intervention an applicant for intervention can not introduce issues outside the scope of the issues raised in the main suit.* United States v. Columbia Gas & Electric Corporation, D.C., 27 F. Supp. 116, 120." (Emphasis supplied)

This case involved a divestiture proceeding and was very much similar to the case at bar. Thus functions of the Federal Power Commission are not merely ministerial, but rather are specifically within the sphere of operation of this highly specialized, qualified and capable administrative agency. In this connection it would seem rather obvious that no order based on even the expertise of this administrative agency can be expected to be perfect in all respects for all time, let alone an order of this court involving the

complete operations of two large companies. Necessarily there will have to be adjustments and changes from time to time. But these will have to be made in due course and in conformity with the law and the practices and procedures, and under the supervision of the Federal Power Commission. Further, we submit that the interests of the [fol. 444] proposed interveners, insofar as the anti-competitive factor is concerned, are properly and adequately represented by the Department of Justice of the United States and the Federal Power Commission. In the anti-trust case entitled *United States* v. *Paramount Pictures*, 334 US 131, 177 (1948) the court stated:

> "The complaint of the (would be) intervenors was directed towards the system of competitive bidding. The Department of Justice is the representative of the public in these antitrust suits. So far as the protection of the public interest in free competition is concerned the interests of those intervenors was adequately represented."

Rule 1.8(a) of the Federal Power Commission Rules of Practice and Procedure permits state commissions to intervene in Federal Power Commission proceedings. Likewise, the natural gas companies are permitted to participate in the Federal Power Commission proceedings. Certainly no plan of divestiture could be devised which would be equally beneficial to everyone even if this were an issue herein. If intervention were permitted herein, numerous issues would be interjected as a casual inspection of the various applications shows. Undue delay would result and both the proposed new company and El Paso could very well be irreparably harmed and weakened by such delay. Each intervener will be producing witnesses and arguing for a plan which would best suit its particular interests. We are not attempting to attribute any selfish or improper motives to the various applicants herein; nevertheless, the Courts have often declared volunteers with the purest of

motives to be officious intermeddlers. The application of Paradox Production based on the ground that it desires to purchase the assets of the new company needs no comment herein.

We now turn to the specific requirements of the Federal Rules of Civil Procedure with reference to intervention, [fol. 445] Some of the interveners herein claim a direct interest sufficient to entitle them to intervene. Certain states who are claiming the aforementioned interests also assert as a ground for intervention their role of parens patriae. As aforesaid, we again submit that none of the claimed grounds of intervention are sufficient if the issue in this divestiture proceeding is limited as the court has indicated and as we believe the issue should be limited.

The courts have indicated that the test as far as interest is concerned should not mean or refer to interest in the subject matter because this presents a hazy question. Rather the test is (1) will the applicant be bound by the judgment rendered (*Moore's Federal Practice,* Vol. 4 §24.06, page 37, cumulative supplement) or (2) whether the applicant could have brought the suit itself (*Commonwealth Edison Company* v. *Allis-Chalmers,* 315 F.2d 564, 567; U.S.C.A. 7th 1963). It is difficult to see how any of the proposed interveners would be bound by the divestiture proceeding within the meaning of that term as it pertains to the requirements for intervention in the Federal Rules of Civil Procedure. This requirement would seem to require that the proposed intervener would be directly, rather than indirectly bound by an order entered herein (*Commonwealth Edison Company* v. *Allis Chalmers,* supra.) We also direct the court's attention to the antitrust case entitled *Fox Publishing Company* v. *United States,* 366 US 682, 689 (1961):

> "We regard it as fully settled that a person whose private interests coincide with the public interests in government antitrust litigation is none the less not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it."

The court also pointed out that it was a sound policy not to permit private antitrust plaintiffs to press their claims against alleged violators in the same suit as the govern-[fol. 446] ment. Further, there is no federal statute which would give the applicants herein an unconditional or conditional right to intervene. Certainly such a state statute is inadequate in that particular field of inquiry involved herein. (*Land O'Lakes Cream v. Louisiana State Board of Health,* 160 F.Supp. 387, 390 (1958). In this case a three-judge district court considering the right of the Attorney General of Minnesota to intervene in an action to declare a Minnesota statute unconstitutional, stated:

> "Notice is taken that a statute of the state of Minnesota specifically gives her Attorney General the authority he is here asserting. However binding that statute may be on the courts of Minnesota, its effect can be little more than persuasive on other courts. Unquestionably, the fact that the Legislature of Minnesota has indicated its interest in the dairy industry should be accorded great weight. Also to be considered, however, is the advisability of allowing the Attorney General of Minnesota to range at large in courts of other states, and of the United States, seeking to have declared unconstitutional laws passed by the legislatures of those states."

"There is no doubt that a state may intervene as parens patriae if the interest of all or a considerable number of its citizens are affected. In this proceeding such rights and general welfare interests of the citizens of Wyoming are only involved in the event intervention is granted to the other applicants and such issues as mentioned hereinabove are interjected in these proceedings. In this event, Wyoming's rights, duties and allegations contained in our application and the Exhibit attached hereto which is hereby referred to and incorporated herein, arise and even become compelling. It might be pointed out that although a State

is on the same footing as a private party insofar as permissive intervention is concerned, Rule 24(b) is given its broadest and most liberal interpretation when a State is involved. *Moore's Federal Practice,* Vol. 4, § 24.10-5, *Mitchell* v. *Singstad,* 23 FRD 62 (1959). Apparently, at least one of the interveners, Paradox Production Company, has realized that this particular proceeding is not a proper one for intervention, as herein sought. Thus, it [fol. 447] has asked in the alternative that it be allowed to appear as Amicus Curiae. Anticipating that other of the interveners herein proceed in a similar manner, we will address ourselves to a brief consideration of the law concerning Amicus Curiae. Once again, however, we point out that it is our conclusion that appearances by the applicants for intervention herein as Amicus Curiae is also improper for the reason that the issue or issues involved herein would be unduly expanded and increased, and for the further reason that we believe that the interests of all the applicants herein are adequately protected and represented by the Attorney General of the United States and the Federal Power Commission. Certainly, only these two parties are completely disinterested. The Public Service Commission of Wyoming only seeks leave to appear as Amicus Curiae in the event that its Application to Intervene is denied and any one of the applicants herein is permitted to so appear since then the issues will be expanded and in this event interests adverse to the citizens of Wyoming will be involved.

The term "Amicus Curiae" is defined and distinguished from intervention in CJS, Vol. 3 "Amicus Curiae," page 1046:

> "An 'amicus curiae,' literally meaning a friend of the court is one who, as a standerby, when a judge is doubtful or mistaken, may inform the court. The term is also sometimes applied to a person who is not a proper or necessary party, but who is allowed to appear to protect the interest of a party he represents.

"*Distinguished from intervention.* Leave to appear as amicus curiae differs from intervention in that the intervener becomes a party to the litigation, and is bound by the judgment, while as stated in § 3 c infra, an amicus curiae does not become a party to the proceedings. The right of counsel amicus curiae to be further heard or to intervene must be based on matters of record."

The following general propositions obtained in determining whether or not one should be permitted to appear as Amicus Curiae:

[fol. 448] 1. The right to be heard as Amicus Curiae is within the discretion of the court and is not a matter of right, but a privilege. 3 CJS, pp. 10-46-1047.

2. For matters of public concern involved, the court exercises great liberality in granting leave to appear. 3 CJS p. 1047.

3. Where all interests are adequately represented, leave to appear as Amicus Curiae has been refused. 3 CJS, p. 1047.

4. One whose attitude is partisan or appears to be partisan should not be permitted to appear as Amicus Curiae. 3 CJS, p. 1047.

5. The office of Amicus Curiae may not be used to involve the action of the court upon issues of fact not confined to jurisdictional matters. *Flinn* v. *Krotz,* 293 S.W. 625.

6. The intervention of Amicus Curiae has been allowed for the purpose of a full and complete presentation of the questions of general interest involved in the proceedings before the court: *Robinson* v. *Lee,* 122 F. 1010, affirmed 196 US 64.

7. An Amicus Curiae has no right to prosecute an appeal or write of error or bill of review, *City and County of Denver* v. *Denver Tramway Corporation*, CCa Colo. 23 F.2d 78, certiorari denied 278 US 616. Nor can he petition for a rehearing. *Green* v. *Biddle*, 8 Wheat. 1.

Although it would seem that the rules concerning Amicus Curiae are much more liberal than those concerning intervention, no such leave to appear as Amicus Curiae should be permitted in these proceedings because of the reasons mentioned above. Nevertheless, if this court in its discretion permits these applicants to appear Amicus Curiae, in view of the public interest and concern and because interests adverse to the State of Wyoming would then be [fol. 449] present, we respectfully submit that in such event the Public Service Commission of Wyoming should also be permitted to appear as Amicus Curiae.

We want to make it very clear that we are not attempting to advocate El Paso's case. We merely are saying that we think the interest of all are adequately represented and protected.

Respectfully submitted,

A. Fred Miller, Special Assistant Attorney General, Counsel for Public Service Commission of the State of Wyoming.

[fol. 450]
State of Wyoming,
County of Laramie, ss.:

Certificate

I, Dwight W. Dahlman, the duly appointed, qualified and acting Secretary of the Public Service Commission of Wyoming do hereby certify that the following shows the number of consumers served by the natural gas utility companies operating in Wyoming as of January 1, 1964,

as reflected by their annual reports filed with the Public Service Commission:

Name of Company	Number of Consumers
Byron Gas Service	135
Cheyenne Light, Fuel and Power Company	15,455
Cody Gas Company	2,614
Edgerton Public Utilities Company	150
Frannie-Deaver Utilities	176
Kansas-Nebraska Natural Gas Company, Inc.	5,462
Montana-Dakota Utilities Co.	9,036
Mountain Fuel Supply Company	4,508
Northern Gas Company	8,462
Northern Mountain Gas Company	3
Northern Utilities, Inc.	20,495
Petrolane-Wyoming Gas Service	362
Salt Creek Utility Company	249
Valley Gas Company	197
Walter F. Kant dba Walt's Service & Supply	26
Wyoming Gas Company	4,771
Wyoming Industrial Gas Company	36
Total	72,137

This total should be multiplied by 4 to compare it with the population in Wyoming. According to the last census, the population of Wyoming was 330,066. Therefore, the consumers served by the above named Companies represent 87.6% of the population of Wyoming.

[fol. 451] Dated at Cheyenne, Wyoming this 27th day of November, 1964.

D. W. Dahlman, Secretary.

(Seal)

Subscribed in my presence and sworn to before me this 27th day of November, 1964.

Margaret G. DeVany, Notary Public.

(Seal)

My Commission expires February 23, 1965

[fol. 452] Acknowledgment of Receipt of Memorandum Brief of Public Service Commission of the State of Wyoming (omitted in printing).

[fol. 454-1]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

C 143-57

UNITED STATES OF AMERICA, Plaintiff,

—v.—

EL PASO NATURAL GAS COMPANY, Defendants.

Salt Lake City, Utah

Before: The Honorable Willis W. Ritter, Chief Judge.

Transcript of Proceedings—December 2, 1964

APPEARANCES:

For the Plaintiff:

Larry L. Williams, Esq., Jack L. Lipson, Esq., Lawrence F. Noble, Esq., Antitrust Division, Department of Justice, Washington, D. C.

William A. Thurman, Esq., U. S. Attorney, 200 Courthouse & P. O. Bldg., Salt Lake City, Utah.

For defendant El Paso:

Gregory A. Harrison, Esq., Robert S. Daggett, Esq., Atherton Phleger, Esq., Brobeck, Phleger & Harrison, 111 Sutter Street, San Francisco, California.

[fol. 454-2] Leon M. Payne, Esq., Andrews, Keith, Campbell & Jones, 25th Floor Humble Bldg., Houston, Texas.

Dennis McCarthy, Van Cott, Bagley, Cornwall & McCarthy, 65 South Main, Salt Lake City, Utah.

For defendant Pacific Northwest:

A. H. Nebeker, Esq., Ray, Quinney & Nebeker, 300 Deseret Building, Salt Lake City, Utah.

Amicus Curiae:

Richard A. Solomon, Esq., William I. Harkaway, Federal Power Commission, Washington, D. C.

Applicants for Intervention:

State of California:

William M. Bennett, Esq., State Building, San Francisco, California.

State of Oregon:

Richard W. Sabin, Esq., Asst. Attorney General, Public Service Bldg., Salem, Oregon.

Washington Utilities & Transportation Commission:

Robert E. Simpson, Esq., Temple of Justice, Olympia, Washington.

Idaho Public Utilities Commission:

M. Allyn Dingle, Esq., State House, Boise, Idaho.

Public Service Commission of Utah:

H. Wright Volker, Salt Lake City, Utah.

[fol. 454-3] Public Service Commission of Wyoming:

A. Fred Miller, Esq., 210 Supreme Court Bldg., Cheyenne, Wyoming.

Public Utility Commission, State of California:

Richard E. Tuttle, Esq., San Francisco, California.

The Washington Water Power Company:

Robert L. Simpson, Esq., Paine, Reeve, Coffin, Herman & O'Kelly, 602 Spokane & Eastern Bldg., Spokane, Washington.

Cascade Natural Gas Corp.:

Richard B. Hooper, Esq., Jones, Grey, Kenoe, Hooper & Olsen, 1000 Norton Bldg., Seattle, Washington.

Washington Natural Gas Co.:

John W. Chapman, Esq., 1415 Joseph Vance Bldg., Seattle, Washington.

A. W. Sandack, Esq., 606 El Paso Gas Building, Salt Lake City, Utah.

Northwest Natural Gas Co.:

Harold W. Pierce, Esq., 735 S. W. Morrison, Portland, Oregon.

Rex J. Hanson, Esq., 909 Kearns Bldg., Salt Lake City, Utah.

[fol. 454-4] Mountain Fuel Supply Co.:

Joseph S. Jones, Esq., 800 Walker Bank Building, Salt Lake City, Utah.

Paradox Production:

C. Keefe Hurley, Esq., Earle C. Cooley, Esq., 60 State Street, Boston, Massachusetts.

Calvin W. Rawlings, Esq., Brigham E. Roberts, Esq., Judge Building, Salt Lake City, Utah.

Pacific Gas and Electric Co.:

Malcolm H. Furbush, Esq., 245 Market Street, San Francisco, California.

Utah Gas Service Company:

Edward F. Richards, Esq., Salt Lake City, Utah.

Southern California Gas Company, and Southern Counties Gas Company of California:

Roger J. Nichols, Esq., 810 South Flower St., Los Angeles, California.

Intermountain Gas Company:

Claude Marcus, Esq., 625 First National Bank Building, Boise, Idaho.

Also Present:

Paul B. Cannon, Esq., 920 Continental Bank Bldg., Salt Lake City, Utah, Representing Pacific Western Pipeline Corp.

[fol. 454-5] December 2, 1964

The Court: I think the first thing we should do this morning is hear the petitions and applications for intervention. I don't care how you proceed about that. Only one of those has been ruled on, and that was not a petition or application for intervention. It was a petition of the Federal Power Commission for leave to appear as amicus, and that has been granted. All right, you may proceed.

Mr. Handley: Your Honor, before we proceed, we have some counsel we would like to have admitted for the purposes of this case.

Immediately to my left is Mr. Malcolm Furbush, representing Pacific Gas and Electric Company. Mr. Furbush has been admitted to the Ninth Circuit Court of Appeals. He is a member of the California Bar, and has been admitted to the California Supreme Court.

Behind Mr. Furbush is Mr. Roger J. Nichols, who represents the Southern California Gas Company and the Southern Counties Gas Company of California. Mr. Nichols has likewise been admitted to the same courts that Mr. Furbush has been admitted to.

Mr. Richard Tuttle is behind Mr. Nichols. Mr. Tuttle represents the California Public Utilities Commission. He has been admitted to the Federal courts in California and to the United States Supreme Court.

[fol. 454-6] All three of these men would like to be admitted to this court for the purposes of this case only.

The Court: That may be granted.

Mr. Furbush: Thank you, your Honor.

Mr. Nichols: Thank you, your Honor.

Mr. Tuttle: Thank you, your Honor.

Mr. Volker: Your Honor, may I present Mr. A. Fred Miller, Assistant Attorney General of the state of Wyoming. Mr. Miller is a member of the Wyoming Bar and the Federal courts of that area, and I would like to move his admission for the purposes of this case.

The Court: He may be admitted.

Mr. Miller: Thank you, your Honor.

The Court: All right, are there any other admissions this morning?

Well, we might as well take this list the way the clerks have gotten it up.

Mr. Thurman is representing the Government in the main matter, of course. Mr. Lipson also. And I suppose Van Cott, Bagley, Cornwall and McCarthy are represent-

ing—yes, they are representing the company, El Paso. Arthur H. Dean, also Gregory A. Harrison. I assume Ray, Quinney and Nebeker are also representing the corporation.

Leon M. Payne. Who is this?

Mr. Harrison: He represents the corporation also.

[fol. 454-7] The Court: And Richard W. Sabin.

Mr. Sabin: Yes, sir. I represent Public Utility Commission of Oregon, your Honor.

The Court: Well, you are the first one. Go ahead.

STATEMENT BY MR. SABIN ON BEHALF OF PUBLIC UTILITY COMMISSION OF OREGON

Mr. Sabin: Thank you, your Honor. I would like to say first of all, that we have put our position as simply as we can in the brief, and I will not therefore take up the Court's time by going over much of the matter that is in here. However, I would like to point out that on Page 7 of the memorandum that I submitted to the Court there is a mistake. The word "liberal" should be "literal." I don't think that changes the meaning of it.

The Court: I think I would catch that.

Mr. Sabin: Then the next point I think I would like to make is that with respect to timeliness that was brought up in the El Paso memorandum. I think probably it is not a point that the Court needs to hear much on, since you already remarked that in your view this was a brand new proceeding. However, I would point out that this case has come down from the Supreme Court about six months ago now. El Paso has just recently put in its plan. Our petition for intervention was filed within a week after the return of the mandate, so I don't think anybody is going to be forced to go over any matters that have already been before the Court on that account.

[fol. 454-8] The Court: Well, I suppose we ought to talk about time for these arguments. I suppose you all want to

go home for Christmas. We will try to get them done by that time. How much time do you want, Counsel?

Mr. Sabin: Five more minutes.

The Court: That is fine.

Mr. Sabin: Then I won't go into any more details on the timeliness. I would like to turn to the El Paso brief at Page 8 and point out there that the quotation on Page 8 —I am sure this was not intentional, but it is taken out of context, and it doesn't stand for the principle which it purports to stand for.

The Court: Where is that on Page 8?

Mr. Sabin: About the middle. The quotation from the Sutphen case.

The Court: You say that is out of context?

Mr. Sabin: Yes, your Honor.

The Court: All right.

Mr. Sabin: I have the complete quote here, but I think probably—

The Court: You might just as well know now that Sutphen is something you are going to have to contend with.

Mr. Sabin: Your Honor, that is what I would like to do right now. I have noticed a remarkable thing about the cases cited in the El Paso memorandum, and that is that they can each and every one be distinguished on the same [fol. 454-9] basis, and that basis is that in every single case where the intervention was denied the Court noted, or pointed out, that the would-be intervenor, or rejected intervenor, had a separate remedy. Now, that is not the case with Oregon. If the Court enters a final order here, we can't bring an independent case.

The Court: So far as Oregon's interest in the rates is concerned, it has a remedy before the Federal Power Commission. And, as a matter of fact, this court isn't going to enter into that at all. I haven't any jurisdiction to do that.

Mr. Sabin: Your Honor, we don't want to try a rate case here.

The Court: I suppose your interest here, representing the citizens of Oregon, or the gas consumers in Oregon, would be concerned with matters that more properly should be discussed before the regulatory commission.

Mr. Sabin: That may be, sir, but, if you make up an order here which forecloses all of the points of inquiry which are involved in a certification case other than their minimum certification levels, we are through.

In that connection, I found another case, your Honor, which I would like to give you, because I think it is germane at this point.

[fol. 454-10] The Court: Well, you give it to me in writing.

Mr. Sabin: Certainly, I will do that. I would say right now that it is Georgia v. Pennsylvania, which is an original proceeding in the Supreme Court in an antitrust case brought by the state of Georgia. The state of Georgia prevailed.

There was one point here the Court made, in citing another case, which had to do with the gas supply to the two states, Ohio and Pennsylvania. They said this:

> "It is not merely a remote or ethical interest, but one which is immediate and recognized by law."

I think that probably would sum up the technical part of this. I would like to add, in line with what the Court directed in the last hearing, we did go ahead and retain some geologists, petroleum engineers, properly speaking. They have done some work for us. However, they have had only a very short time to work on this case because, as I recall, it was just a little over a week ago—or two weeks ago—El Paso told us we could have access to their information, and I will say they have been very cooperative with our petroleum engineering people.

Our preliminary estimates, which our people are willing to go on record on at this point, indicate an overstatement

in this San Juan area of reserves in the New Company by 85 per cent, approximately. I would like to point that out. [fol. 454-11] It is a matter of our grievous concern, and it fits right in with the Georgia case. I will submit the citation on that in writing. Thank you.

The Court: Well, now, the next man on the list is Calvin L. Rampton. I wonder whom he represents?

Mr. Sabin: That is our local counsel, your Honor.

The Court: All right. James R. Cunningham.

STATEMENT BY MR. SIMPSON ON BEHALF OF WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Mr. Simpson: Your Honor, Mr. Cunningham is not here, but I am Robert E. Simpson, Assistant Attorney General for the state of Washington appearing on behalf of the Washington Utilities and Transportation Commission.

The Court: Very well.

Mr. Simpson: As your Honor knows, the Washington Commission filed its brief in support of its amended application for leave to intervene with this court last month, specifically on November 24. As I understood the language of the Court during the October 19 proceeding, this memoranda was to include any argument, any evidence, any law that we might have in regards to what our interest was.

The Court: Well, a final presentation on this matter. I am going to rule on it.

Mr. Simpson: I understand that, your Honor. It was also my understanding that at this meeting today, if we had any witnesses to present insofar as showing what our interest was to intervene, this would be the proper time to [fol. 454-12] do this. I would like to point out to the Court that at this time the Washington Commission does not have any witnesses insofar as showing what their interest for intervention may be, as such. I do not intend, your Honor, to summarize the brief, since I am sure the Court is fully aware of what is contained therein, but, if the Court has any questions in regard to what our position was—

The Court: No, I think I understand your position.

Mr. Simpson: All right, your Honor. If there are no questions, I would have nothing more at this time and would submit our application for intervention to be decided upon.

The Court: Very well.

Mr. Simpson: Thank you.

The Court: Now, Keith Sohm.

Mr. Sohm: The Attorney General's Office is presenting Utah interests, your Honor.

The Court: You don't have any petition in here?

Mr. Sohm: No, we have no petition.

The Court: As I understand it. Larry D. Ripley.

Mr. Dingle: Your Honor, Mr. Ripley is not here, but I am Allen Dingle, Assistant Attorney General of Idaho, and I will speak on behalf of the Idaho Public Utilities Commission.

The Court: Very well.

[fol. 454-13]

STATEMENT BY MR. DINGLE ON BEHALF OF IDAHO PUBLIC UTILITIES COMMISSION

Mr. Dingle: The words I have to say, your Honor—I will concede with my brothers from Oregon and Washington. The state of Idaho, I will frankly admit, has found little law that would permit intervention by the states in this case. There is little law we can find upon the matter in any regard, and the law there is is basically against us except for the Mitchell v. Singstad case, and I might be presumptuous to say, but I do not believe we have an intervention as of right. If we do have an intervention, it is simply in the court's discretion, and to that we will accede.

We do believe we have a vital interest in this matter, and, in conclusion, I will say that the reservations that we have to El Paso's proposed plan are stated in our brief, your Honor, but beyond those reservations, and they are also mentioned in Mr. Sabin's and Mr. Sweeney's brief, we

do accede to the proposed plan of El Paso, because we feel that something has got to be done, and the time is at hand now.

If the Court has no further questions, that is all I have to say.

The Court: All right. Now, Cartano, Botzer and Chapman.

STATEMENT BY MR. CHAPMAN ON BEHALF OF WASHINGTON NATURAL GAS COMPANY

Mr. Chapman: May it please the Court, I am John Chapman of Seattle, for Washington Natural Gas Company. On October 19 our counsel made his own statement to the [fol. 454-14] Court, which is in the transcript.

As we pointed out in our memorandum, at that time we didn't have adequate information about the proposed plan. We had not had a chance to analyze it. We had done considerable work in searching records of the FPC, and from that we had come to certain incomplete conclusions, which were stated by Mr. Meiburger.

Since that time we have had consultations with El Paso and their engineers, and we have learned much more about this. And, as we stated in our memorandum, at the present time it is our view that this proposed plan of divestiture will not be adverse to our interests, will not be in any way harmful, and for that reason we have asked that our petition for intervention not be ruled upon at this time, because we foresee that there may be further developments in the case, and we don't know what other parties may do, or other intervenors may be permitted to come in, and to attack the plan or to propose some major modification of it, in the light of which it would appear that we would wish to oppose that.

It may seem strange, but we have filed our petition; we are urging that we be allowed to intervene, but at the present time we would respectfully request that a ruling on our petition be deferred.

That will not impede the business of the Court; it will [fol. 454-15] not clutter the record. On the other hand, if we had an adverse ruling, and it were on the merits, then we would be precluded unless we took an appeal, and that is something we don't want to do, of course.

That is our position. We would like to let the application pend and, if nobody is permitted to intervene, and if it is purely a matter of the Court examining the plan and any comments that the Department of Justice may have upon it, we would be content to have the matter submitted that way.

On the other hand, if there are changes here that will interfere with the orderly and speedy divestiture, which is what we all agree should be done, then we feel that we should be permitted to renew our application for intervention and be heard at that time.

The Court: Well, don't you think that that would be the proper time to file another, if you had anything you felt obliged—

Mr. Chapman: My theory is that if our application were dismissed at the present time, it might appear to be a dismissal upon the merits, which would preclude our coming in at another time.

The Court: Well, there are some very great difficulties in this matter with all of these petitions and applications for intervention on the merits, and we are going to get into [fol. 454-16] that today, I hope.

If you are not entitled—without expressing a ruling on it at this point—but if you are not entitled to file an application for intervention in this lawsuit, why, it won't be ruled upon along with the rest of them.

Mr. Chapman: I want to make this point, your Honor. I do not agree with the counsel for the State Commissions who have spoken up until now that they cast doubt on the right to intervene as a matter of right. We have filed a brief here. The brief is short. The pages we cite, I feel, bring us squarely within the first part of Rule 24. I think we have the right to intervene. We are not urging that we

be permitted in at this time, because, as I say, we do not wish to oppose the El Paso plan, but I think we have an interest in the property that is to be distributed, and I certainly think we will not be adequately represented by the Government, if there is a proposed change. If there is not a proposed change, then we don't need to be represented any further; but, if somebody comes in and says, "Do this, or do that," which is a substantial modification, then I feel we would have a right to intervene as a matter of right. And I want to say in all sincerity, this is not just a sham application we have filed. We feel very definitely and very keenly that we have a vital interest and therefore we come under Rule 24.

The Court: Very well.

[fol. 454-17] Mr. Chapman: Thank you, your Honor.

The Court: All right.

Mr. Simpson: Excuse me, your Honor. May I be heard again for a minute. Mr. Simpson.

The Court: Yes.

Mr. Simpson: Evidently there has been a misunderstanding, and I believe it has been brought out by what Mr. Chapman said.

Our position, as far as the state of Washington, is contained in our brief, where we believe we have the right to intervene as a matter of right and also under the permissive—or would hope to have under the permissive intervention.

I did not mean to give any impression that we are waiving that in any way. The only thing I am saying is that we are standing on our brief as submitted. Evidently Mr. Chapman understood from what, I believe, Mr. Ripley said, that we had given this up. We have not.

Mr. Sabin: The same is true with the state of Oregon.

The Court: Apparently we are going to have two or three speeches every time anybody else talks. Let's get everything said when you are standing up the first time.

Mr. Sandack.

Mr. Sandack: Mr. Chapman has made the statement.

[fol. 454-18] The Court: Brigham E. Roberts.

Statement by Mr. Roberts on Behalf of Paradox Production Company

Mr. Roberts: Your Honor, we represent Paradox Production Company. We have amended our application from one of intervention to one in the alternative, to appear as amicus curiae, and it is our desire to present a proposal of divestiture which we think is in accordance with the mandate of the Supreme Court and which we think would be in the public interest. As indicated by our—

The Court: You withdraw your application for intervention?

Mr. Roberts: Yes. I think that what we should do, if we are granted the privilege of appearing as amicus curiae, your Honor, and we do this on the basis only of being helpful to the Court, and we think that our application indicates that we have competent management of persons who have heretofore been engaged in not only the construction of what was formerly the Pacific Northwest Pipeline, but also participated in its management.

We also are a group that is independent in every way of El Paso. I think from our application it indicates that we are persons who have the financial ability to put over a plan which should be in the public interest, and it is our feeling that eventually in these proceedings the Court is going to have to turn to some person in our class. If we are not the only ones, we are the only ones so far who have [fol. 454-19] appeared in this.

The Court: I don't take such a pessimistic view.

Mr. Roberts: I see, your Honor, but, in any event, that is our feeling, and we would like to be helpful to the Court, and that is our position in this case.

The Court: All right. C. Keefe Hurley.

Mr. Roberts: He is with Paradox, your Honor.

The Court: All right. Joseph S. Jones.

STATEMENT BY MR. JONES ON BEHALF OF MOUNTAIN FUEL SUPPLY COMPANY

Mr. Jones: If the Court please, I represent Mountain Fuel Supply Company. Mountain Fuel Supply Company have three contracts with Pacific Northwest. One was dated, I think, in 1956, a contract under which Pacific Northwest agreed to sell to Mountain Fuel, and Mountain Fuel agreed to buy from Pacific Northwest, an average of 50 million cubic feet of gas a day, to be delivered at a point near Green River, Wyoming.

The second contract is a contract under which Pacific Northwest and Mountain Fuel agreed to gather for each other the gas in the LaBarge and Big Piney Field in Wyoming.

And the third contract is one providing for the exchange of gas of Mountain Fuel in the LaBarge-Big Piney Field to Pacific Northwest, and Pacific Northwest, in turn, agreed to deliver the same quantities of gas to Mountain Fuel at Green River.

[fol. 454-20] Now, under Rule 24 we think we have a right to intervene in this case, because these contracts are property of Mountain Fuel Supply Company, and they are to be transferred in connection with this divestiture.

The Court will say, "Well, what about the Warner Bros. case, the Sutphen case?"

And I say the case, I think, is distinguishable so far as Mountain Fuel is concerned because in that case it involved the guarantee of a lease of a subsidiary of Warner Bros., and the lease was to be transferred to one of the corporations to be created in the divestiture. And the Supreme Court said that there was no showing that the guarantee would not be as strong in the new company as it was in the old company.

The Court: Is there any showing that your three contracts would be less strong in the new company than in the old? It looks to me like Sutphen is right on the nose.

Mr. Jones: But in that case, if the lease itself, rather than a guarantee of the lease, were involved the decision of the Supreme Court might have been different. And in this case these contracts are direct contracts which are to be transferred.

In that case all that was being transferred was the lease, and the guarantee was to be assumed by one of the companies.

[fol. 454-21] That was a matter of financial responsibility. In this case it is a matter of performance of a continuing contract, in addition, perhaps, to financial responsibility.

The Court: Well, I see your point.

Mr. Jones: Now, so far as the—so far as Mountain Fuel is concerned, they are not dissatisfied with the plan which has been presented by El Paso. We think it is practicable and in substance a workable plan. But that may not be the plan which this Court finally adopts. Therefore, the interest of Mountain Fuel may be adversely affected by the divestiture of this property, and that is the position of Mountain Fuel, your Honor.

The Court: Thank you. Now, Paul B. Cannon.

Mr. Cannon: If the Court please, I do represent Pacific Western Pipeline Corporation. We have not filed any petition or application for intervention, and my name is on the list, with your Honor's permission, for information only. So I am not appearing at this time in these proceedings to present any matter to the Court.

The Court: Very well. Virgil H. Wedge. Mr. Wedge.

Larry Pankonien.

Mr. Pankonien: Your Honor, my name is L. R. Pankonien. I represent Tennessee Gas Transmission Company.

The Court: I didn't catch the name of the person you represent.

[fol. 454-22] Mr. Pankonien: Tennessee Gas Transmission Company. We are not seeking to intervene or become a party, but my name is on the list as a matter of interest.

The Court: Robert E. Simpson.

Mr. Simpson: If your Honor please, I represent the Washington Water Power Company at Spokane, Washington. We take the position that we have the right to intervene on the ground that a property subject to divestiture has a three-party ownership by the Washington Water Power Company, Washington Natural Gas Company, and El Paso.

However, we are not opposing the plan and are not pursuing our intervention today insofar as the present plan is concerned.

However, if the Court should adopt a different plan which could be adverse to the interest of Washington Water Power Company, we would like to have the right to intervene at that time.

The Court: What is your property interest?

Mr. Simpson: The three companies, the Washington Water Power Company, El Paso, and Washington Natural, have a partnership, in essence, to develop an underground gas storage field in Lewis County, Washington.

The Court: That contract is between whom and whom?

Mr. Simpson: The El Paso Natural Gas Company, Washington Water Power Company, and Washington Nat-
[fol. 454-23] ural Gas Company.

The Court: Yes.

Mr. Simpson: The latter two are distributors in the state of Washington. And this underground gas storage field is being developed on a joint basis. To date substantial sums of money have been expended in the development of this field. As of today I would say there is in excess of a million dollars. The field is not yet operable. It is still in the development stage. A temporary certificate has been granted by the Federal Power Commission for the three-party development of this field.

The Washington Water Power Company is the temporary coordinator for development of this field. If there is a divestiture, which there will undoubtedly be, that property will then go over to the New Company. So there is

a specific property which is subject to divestiture by this court.

But we are not opposing the plan, and our interest today is only insofar as a different plan might be adopted by the Court.

The Court: All right. Anything else? Robert L. Simpson.

Mr. Simpson: I am Mr. Simpson.

The Court: I am sorry. William M. Bennett.

STATEMENT BY MR. BENNETT ON BEHALF OF THE STATE OF CALIFORNIA

Mr. Bennett: May it please the Court, I will not repeat here again, your Honor, those reasons I have set forth in [fol. 454-24] support of the application to intervene.

The Court: You and the representative of the Public Service Company are in disagreement about this.

Mr. Bennett: Ultimately that may be true, your Honor, but I am not prepared—

The Court: You represent whom?

Mr. Bennett: The State of California, your Honor.

The Court: Are you from the Attorney General's Office?

Mr. Bennett: I am representing the Governor of the state of California and the Attorney General of the state of California, and the state of California in its sovereign capacity, as I have throughout these entire proceedings.

The Court: Have you read the El Paso response to the petitions in intervention here?

Mr. Bennett: Yes, your Honor, I have.

The Court: Well, you know what I am talking about then.

Mr. Bennett: Yes, I do.

The Court: All right.

Mr. Bennett: Let me ask the Court to take judicial notice of California v. The Federal Power Commission, 369 U.S. 482, and the reasons set forth therein pertaining to my application to intervene. I would ask the Court to take ju-

dicial notice of the very Supreme Court decision to deter-
[fol. 454-25] mine which we are now before this Court.

The Court: Have you given me that citation in your brief?

Mr. Bennett: Yes, your Honor, I have.

The Court: All right.

Mr. Bennett: Now, I would point out that California is in a position unlike any other applicant to intervene, but I would also recommend and urge the Court that the applications of these other parties be granted as a matter of right. I think, your Honor, we may be embarking upon the same mistake and error here which occurred in this court several years ago when this court, without cooperation of the Federal Power Commission, proceeded to determine this matter.

The Court: This court didn't do that.

Mr. Bennett: I realize that, your Honor.

The Court: What this court did several years ago was send it to the Federal Power Commission in the first instance, before we passed upon the antitrust matters, and the Federal Power Commission held hearings. The Federal Power Commission approved the merger, an appeal was taken, and the Supreme Court of the United States said that the antitrust considerations were paramount, and they reversed the Power Commission and sent it back here.

Mr. Bennett: Yes, your Honor.

The Court: Now, the antitrust considerations are para-
[fol. 454-26] mount by virtue of that decision of the Supreme Court of the United States, and you fellows are coming in here with conversations about regulatory commissions, considerations which should be submitted to the Power Commission. The Supreme Court has handed me a mandate on that subject.

Mr. Bennett: Yes, your Honor.

The Court: And this Court didn't proceed without your assistance to determine the matters that should go before a regulatory commission. The Court sent it to the regulatory commission, Mr. Bennett.

Mr. Bennett: What I am stating, your Honor, is this: that just as there was an error in that proceeding, as the Supreme Court very clearly pronounced, when it reversed your Honor in this proceeding, so also, if this Court proceeds to grant what El Paso requests of you without permitting state to intervene and preserve their position before you, to save their position before the Federal Power Commission, if the result here violates the Clayton Act, as it appears before the Federal Power Commission, all of this will be for naught,

The Court: That is right.

Mr. Bennett: That is why I am stating to your Honor that we must be given the opportunity to present and to preserve our right here. And, if not, in my judgment—

The Court: I would like to know what your right is, Mr. Bennett. This conversation about being reversed is con-
[fol. 454-27] versation about how the case has proceeded heretofore. This conversation about what mistakes we may make in the future doesn't impress me at all. What I would like you to address yourself to is Section 24 of the rules.

Mr. Bennett: That is why I am standing here.

The Court: Whether or not you are entitled to intervene.

Mr. Bennett: I would like to be heard on that, your Honor.

The Court: That is all I am interested in here.

Mr. Bennett: I would like to get to it in my way, if the Court please.

Now, this is a unique case, as I said previously, and I don't think it is particularly helpful to cite cases denying intervention and, indeed, even granting intervention, although I think those cases do support our position.

This is a case involving a regulated pipeline corporation, and it necessarily involves this court, the Federal Power Commission, and the interests of all the states, and particularly California, as they must be developed here, and as they must be developed before the Federal Power Commission. And if you are to deny us intervention and grant

what El Paso wishes and then send us to the Power Commission where your judgment, I presume, would be final, our rights will be meaningless unless and until the Su-
[454-28] preme Court pronounces that we have rights. And I am suggesting that is exactly what will be done. I am asking your Honor to take judicial notice of California v. the Federal Power Commission and of the permission of the United States Supreme Court allowing California to participate in the last proceeding as a friend of the court, and you will find in those decisions, if the Court please, all of the reasons as to why California should be admitted.

I think it very important that this court take the full participation of the Federal Power Commission in these proceedings so that the things I am urging be done or not be done can be presented to the Court by the regulatory agency.

There is a docket before the Federal Power Commission involving this very proceeding and, just as the failure of the Federal Power Commission and this Court to cooperate in the past led to reversible error, so also will it in the future.

Now, California strongly opposes the plan of El Paso. It is my position that there has been a violation of Section 7 of the Clayton Act and, as I am standing here, there is a violation of Section 7 of the Clayton Act, and that so long as this court lets any substantial ownership of the equity of the New Corporation by El Paso, that will continue to be a violation of Section 7 of the Clayton Act.

Now, there is no representative before your Honor who [fol. 454-29] can speak for the interest of the state of California save myself, and the failure to heed what I am saying would constitute, in my judgment, grounds for reversal. And I would be quick to test that. I will apprise you of that fact.

The Court: Well, Mr. Bennett, we have had that half a dozen times.

Mr. Bennett: I realize that, your Honor.

The Court: I don't think you need to emphasize what you intend to do.

Mr. Bennett: I think I have a bit of history on my side.

The Court: Proceed as you have heretofore.

Mr. Bennett: Yes, and I am urging the Court to heed what I say because, in the long run, if what I am saying is correct, and it was in the past—

The Court: I believe I understood you the first time.

Mr. Bennett: (Continuing) —all of this would be for naught. So I would seriously request your Honor to grant the intervention of the state of California. Otherwise, I think I would be compelled to file a complaint addressed to the very proceedings and appear as a party before you then.

The Court: That is about the seventh time.

Mr. Bennett: Pardon, your Honor?

The Court: Once is enough.

[fol. 454-30] Mr. Bennett: Yes, your Honor. Thank you very much.

The Court: Harold Pierce.

Mr. Pierce: Your Honor, I represent Northwest Natural Gas Company.

The Court: You represent whom?

Mr. Pierce: Northwest Natural Gas Company of Portland, Oregon.

In light of the fact that the position of my company is substantially the same as that of Washington Natural Gas Company, as ably stated by Mr. Chapman, I see no reason to burden the record further with any restatement of those reasons.

The Court: All right, thank you. Rex J. Hanson.

Mr. Hanson: If it please your Honor, Mr. Pierce just stated our position. I am associated with him.

The Court: Gustin, Richards and Mattsson.

Mr. Richards: May it please the Court, we represent Utah gas service distributors in the state of Utah. Our main interest in this matter is to see that we get an in-

dependent management of the New Company, because we will have to buy all our gas from the New Company.

The Court: You represent whom?

Mr. Richards: Utah Gas Service Company.

The Court: Who is the Utah Gas Service Company?

Mr. Richards: What is that?

[fol. 454-31] The Court: Who is that?

Mr. Richards: It is a Utah corporation supplying Moab, Monticello, Vernal, San Francisco Chemical, Texas Gulf Supply—or Texas Gulf—Grand County, and two or three Government agencies.

The Court: You have a contract with El Paso?

Mr. Richards: We have service agreements.

The Court: Service agreements?

Mr. Richards: Purchase agreements.

The Court: Yes, all right, Richard A. Solomon.

Mr. Solomon: May it please your Honor, we have already been permitted to participate as amicus.

The Court: Yes, all right. Howard E. Wahrenbrock.

Mr. Solomon: He is the solicitor.

The Court: Yohalem.

Mr. Solomon: He is also with us.

The Court: Yes, all right. Richard B. Hooper.

STATEMENT BY MR. HOOPER ON BEHALF OF CASCADE NATURAL GAS CORPORATION

Mr. Hooper: May it please the Court, I am Richard B. Hooper, counsel for Cascade Natural Gas Corporation, a Washington corporation, with its principal place of business in Seattle.

Cascade has endeavored to comply fully, your Honor, with the order of this court made at the October 19 hearing and has, accordingly, submitted its memorandum of evidence, law, and argument.

[fol. 454-32] On the present record the allegations of fact contained in its application for leave to intervene and the affidavits presented as part of its memorandum of evidence

as to Cascade's relationship with El Paso, its interest in the matter before this Court, its tangible concern with the possible effects of divestiture pursuant to the pending plan, stand uncontroverted by either adversary, El Paso or the Department of Justice, and therefore, for the limited purpose with which we are now concerned, the right to intervene must be deemed to have been admitted.

Based on this record we have submitted authorities in our brief which we believe sustain the right under the existing circumstances to intervene and respectfully ask the Court to rule thereon in favor of Cascade's application much in the nature of a motion for summary judgment.

I would state also that we concur fully with the position expressed by counsel for Mountain Fuel Supply and have argued the point in our brief with respect to the essential distinction involved here in the contractual relationship between El Paso and its customers, the distribution companies, particularly as it should be distinguished from the facts in the Sutphen Estate case.

We further strongly urge that each application for intervention should be considered and ruled upon on its own merits and that it does not at all follow that because one [fol. 454-33] contractual party with El Paso may be denied intervention a failure to bring itself within Rule 24, another party on a different record, such as I submit Cascade Natural Gas Corporation has presented in prima facie form, may not be allowed to intervene.

No useful purpose, I feel, would be served at this time in orally reviewing either the facts or the law that we have set forth in our application and memorandum, and therefore, in the interest of conserving the Court's time and minimizing the record, Cascade Natural Gas Corporation stands upon its record as filed.

Thank you, your Honor.

The Court: Very well. Roger J. Nichols.

Mr. Nichols: If the Court please, I represent Southern California Gas Company and Southern Counties Gas Company in California.

I believe we made our position fairly clear in our petition to intervene and will stand on that position.

The Court: Very well. John T. Murphy.

Mr. Nichols: Mr. Murphy is not here. I believe my name is there also.

The Court: Yes. Mr. Tuttle.

STATEMENT BY MR. TUTTLE ON BEHALF OF PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Mr. Tuttle: May it please the Court, I represent the Public Utilities Commission of the state of California.

Shortly before the November 19 deadline the Commis- [fol. 454-34] sion filed its petition asking for leave to intervene in this proceeding. After we filed our petition, El Paso, the defendant, filed the memorandum you referred to wherein they purport to find discrepancies between the position as stated by the Public Utilities Commission and the position taken by the special counsel for the state of California, who had previously filed his own petition to intervene.

I might just spend a moment on that. We know that for many years the state of California has been involved in the antitrust proceedings that we are concerned with here, through its special counsel, and it was pointed out in October that probably we would not be here today had it not been for the prolonged efforts by California's special counsel in those proceedings.

But my client, on the other hand, is the Public Utilities Commission of the state of California. This is the constitutional state agency charged with regulating utilities. It has not previously had any part in this case. My appearance before you in accordance with the Commission's wishes and our desire to intervene is directed primarily to what might be called the regulatory, rather than the competitive aspect of the divestiture proceeding.

The California Commission, in other words, desires to protect the California consumer from any unreasonable

burden that might be placed upon him if, as a result of the divestiture, El Paso was placed in a position where its cost [fol. 454-35] of service was unnecessarily and unreasonably high, a cost which ultimately would be borne in large part by the California consumer.

The Public Utilities Commission of California does not, therefore, seek intervention in order to examine the divestiture plan with an eye to see whether or not a vigorous independent competitor will be created. This is, of course, important, that the Supreme Court's directive be complied with precisely, but that restoration of competition, that aspect of this case, is not the real reason for my presence. I speak on behalf of the consumers of California through our Public Utilities Commission, and it is my desire to protect them from a divestiture plan which would unnecessarily and unreasonably increase El Paso's cost of service and increase the cost of gas to our distribution companies, which would be passed on to California residents.

I might say generally we concur in the filing of Mr. Solomon of the Federal Power Commission where he explains his concept of the relative role of the SPC and this Court, and we think the suggestion which was made by Mr. Nichols on behalf of the Southern California Gas and Southern Counties Gas bears serious consideration This was the thought, your Honor may recall, that the divestiture decree could be made expressly conditional upon these regulatory details being decided by SPC after hearing in which all of us who had an interest would have a fair op- [fol. 454-36] portunity to be heard. This would give the court the opportunity to decide the antitrust part of the case, the divestiture or creation of a truly separate entity with which we are not concerned—we, meaning the Public Utilities Commission of California. What we would ask would be an opportunity to be heard before the Federal Power Commission at an appropriate hearing. We would want to be assured, however, that the scope of the Federal

Power Commission's inquiry and what we could present at that hearing would bear upon those things which do concern us.

I might say that if a conditional decree such as was referred to or has been suggested here were to be forthcoming, our interest in being granted status as an intervenor would disappear. If we were assured of the full opportunity to make the showing we feel we have to make on behalf of the California consumer before the FPC, we would not desire to be in this proceeding.

The Court: All right. Fred A. Miller.

Mr. Miller: May it please the Court, my name is Fred Miller, and I represent the Wyoming Public Service Commission. We have filed a brief herein and, unfortunately, I have not been able to serve a copy on all of counsel of record. Consequently, I will file sufficient copies with the clerk of the court, along with an acknowledgment of service.

Our position is stated in our brief, and I will not elabo- [fol. 454-37] rate upon it at this time, except to say that we believe that the divestiture proceeding and the only question involved herein is the anticompetitive factor. We think the proper parties are already here, and that is the Justice Department and the Federal Power Commission, this Court, and the El Paso Company. Not unless your Honor permits any other intervention are the interests of Wyoming involved. Consequently we ask that we only be permitted to intervene if you should permit any of these other intervenors herein. The reasons are set forth in our petition, and I won't go into them at this time.

In our brief we have also asked leave to amend to include a petition to appear as amicus curiae, again only in the event that other people, the applicants herein, are permitted to appear as amicus curiae.

The Court: Richard A. Peterson.

STATEMENT BY MR. FURBUSH ON BEHALF OF PACIFIC GAS AND ELECTRIC COMPANY

Mr. Furbush: Mr. Peterson is general counsel with Pacific Gas and Electric Company, and I am appearing on behalf of that organization.

The Court: You represent whom?

Mr. Furbush: Pacific Gas and Electric Company.

The Court: All right.

Mr. Furbush: It is a utility in northern and central California.

The Court: I have heard of them.

[fol. 454-38] Mr. Furbush: I believe you are aware of the position which we took in our petition to intervene in which we expressed the desire to participate in these proceedings for the limited purpose of maintaining the position that this court is here concerned merely with the antitrust aspect of the proposed divestiture plan.

The Court: That is the Court's view of it, too.

Mr. Furbush: Yes, your Honor. And that, as an illustration, the contracts which El Paso proposes it enter into with New Company, as I would view that, the Court would look at these contracts and determine whether or not they were compatible with the antitrust laws and, if they were compatible with the antitrust laws, they would permit such contracts to be entered into and function as part of the plan.

However, the question of whether those contracts meet the public convenience and necessity is something to be decided by the Federal Power Commission. And my purpose is merely to do what I can to insure that the decree issued in this proceeding is not hustled over to the Federal Power Commission and said, "This is the end of the matter. These contracts have been sanctified by Judge Ritter and, under his jurisdiction under the Clayton Act and the Supreme Court's order, and therefore the Federal Power Commission cannot change or alter these contracts."

The Court: I suppose the Federal Power Commission [fol. 454-39] will see fit to do its duty when it gets over there, no matter what I do.

Mr. Furbush: Well, this is the problem, your Honor. I think we are all concerned with one thing here, an expeditious termination of this terrible mess, and I am trying to present a logical manner in which it can be accomplished. And I say that if there is some argument that can be made on the basis of its decree, somebody has got to make that argument. And then that is going to go up. It is going to go up the other side.

The Court: So what do you suggest I do?

Mr. Furbush: What I suggest, your Honor—thank you for asking. What I suggest, your Honor, is this, that you specifically state in the decree that you are passing only on the antitrust aspect of this and that the Federal Power Commission does have jurisdiction under the Natural Gas Act, and you are not purporting to infringe in any way upon that jurisdiction. I think that the suggestion of the Federal Power Commission, Mr. Solomon's suggestions in his memorandum, is the proper procedure to follow, and I would have no concern here at all if I had assurance that this was what was going to be done.

I, in fact, follow the same ideas that were expressed by Mr. Tuttle in that regard.

The Court: Yes. I was going to say you are making the [fol. 454-40] same suggestion that Mr. Tuttle made.

Mr. Furbush: In effect, your Honor.

The Court: In effect. That we condition it in some way so that the Federal Power Commission will feel free to do its constitutional, statutory duty.

Mr. Furbush: Yes, your Honor.

The Court: All right. Now, let's see, who was the last gentleman who spoke?

The Clerk: Mr. Furbush.

The Court: Bryce E. Roe. Milford Springer.

Mr. Nichols: Milford Springer is attorney and general counsel for Southern Gas Counties Company, and I am appearing for him.

The Court: Marcus, Leggat, and Marcus.

Mr. Marcus: Your Honor, Intermountain Gas Company is a gas distribution company in Idaho. It is not opposing the plan submitted by El Paso. Our position is simply this, that we think the plan is fair and equitable and workable, but if other parties similarly situated are allowed to intervene, then we would like to have that right, too.

The Court: Very well. Charles H. McCrea. H. Wright Volker. Harvey Dickerson.

Mr. Volker: Your Honor, I am speaking on behalf of the Public Service Commission of Utah and our position is substantially the same as that of the other states, I believe. [fol. 454-41] I might add that the Public Service Commission of Utah feels that this plan is generally fair and equitable. However, some important problems are before the Court with respect to it and it may result in some modifications that may adversely affect the interests of the state of Utah and for that reason we request leave to intervene.

The Court: Have you filed a petition?

Mr. Volker: Yes, we have, your Honor.

The Court: Did you file a supporting memorandum?

Mr. Volker: Petition and memorandum, your Honor.

The Court: All right. Harvey Dickerson. Harvey Dickerson. Well, I believe that is all of them. If I have missed anybody, I would be glad to have you speak up. Anybody on motions, applications, or petitions for intervention or for amicus.

All right. Now, also set forth today was a hearing on proposals for divestiture. Are you folks prepared to proceed with that?

Mr. Harrison: Yes, your Honor.

The Court: Before we do, I will take a brief recess.

(Recess had.)

Mr. Sabin: Your Honor, may I approach the bench and hand you the citation?

The Court: Hand it to the clerk.

Mr. Harrison: If your Honor please, before submitting [fol. 454-42] Mr. Kayser for cross-examination, we have a few more questions we would like to ask him. May I call him to the stand again, please?

The Court: Proceed.

PAUL KAYSER, recalled as a witness on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct examination.

By Mr. Harrison:

Q. Mr. Kayser, you gave some testimony earlier in connection with the holders of common stock in various divisions of 200 shares per stockholder and less, and I would show you a document entitled, "El Paso Natural Gas Company Common Stock, Record Date—April 24, 1964," and with that refreshing your mind would you please state what the memorandum shows?

A. Yes. It shows substantially what I testified to before, and that is for holdings of one share to 99 shares there are 59,589 holders; for 100 shares even, there are 25,520 holders; for 101 to 200, in that category, there are 17,771; a total from 1 to 200 shares lots the total number of stockholders is 102,880.

Q. And the total number of stockholders of the company is what?

A. The total number of stockholders for the company is [fol. 454-43] 116,813.

OFFERS IN EVIDENCE

Mr. Harrison: Thank you. If we may offer this, if your Honor please. Any objection?

Mr. Lipson: May I see the document?

(Defendant's Exhibits "B" and "C" were thereupon marked for identification.)

By Mr. Harrison:

Q. Mr. Kayser, I show you another document entitled, "El Paso Natural Gas Company Common Stock, Record Date—April 24, 1964, List of Holders of 100,000 shares or More, Individual Holders," and I will ask you if you will identify the document and testify to what it shows?

A. Yes. The document having that heading, which is a list of the holders of 100,000 shares or more of El Paso stock. It shows, set forth in alphabetical order—first we have the individual holders and then we have the—

Q. Perhaps if we will stop on the individual holders, there are seven of those, is that correct?

A. Yes.

Q. And the largest holder is in what amount?

A. The largest holder is 229,429 shares.

Mr. Harrison: I will ask that this document be admitted. Do you have any objection, Counsel?

Mr. Lipson: No objection.

The Court: Received.

[fol. 454-44] (The document marked Defendant's Exhibit "C" for identification was received in evidence.)

The Court: Now, was there any objection to the earlier document?

Mr. Harrison: No, your Honor. I asked counsel, and he had no objection.

The Court: All right. Received.

(The document marked Defendant's Exhibit "B" for identification was received in evidence.)

(Defendant's Exhibit "D" was thereupon marked for identification.)

By Mr. Harrison:

Q. Turning now to the second sheet, entitled, "El Paso Natural Gas Company Brokers and Business," I will ask you to describe the document.

Mr. Harrison: You have that, haven't you?

Mr. Lipson: Yes, I do.

A. That is similar to the one dealing with the individuals, which is a list of the brokers and nominees that hold more than 100,000 shares.

The Court: A list of whom?

The Witness: A list of the stockholders of the El Paso Natural Gas Company who hold more than 100,000 shares. It is a list of the brokers and nominee holders, not individuals.

By Mr. Harrison:

Q. Will you indicate in general the character of the busi-
[fol. 454-45] ness activities of these holders?

A. Well, every one of them, to my knowledge, are what is generally known as brokers or investment bankers, having officers in New York and elsewhere throughout the United States.

Q. It is common practice, is it not, for such business concerns to hold stocks and securities in their own name on account of customers?

A. Oh, yes.

Q. Have you any knowledge of the customers for whom any of these companies hold any such shares?

A. No, not a single one.

Mr. Harrison: I might say in that connection we heard, Mr. Williams, that you had conducted some investigation in that respect. Can you give us any light on that?

Mr. Lipson: Mr. Harrison, we would be very pleased—we haven't run up a tabulation yet, and I assume that is what you are after, but we do have the data summarized in our own records, and we would be happy to make that information available to the Court.

Mr. Harrison: Thank you. We shall offer the document in evidence, if the Court please.

The Court: Received.

(The document marked Defendant's Exhibit "D" for identification was received in evidence.)

[fol. 454-46] Defendant's Exhibit No. "E" was thereupon marked for identification.)

By Mr. Harrison:

Q. Have you a document there before you, Mr. Kayser, entitled, "Number of Shares of El Paso Natural Gas Company Stock Traded on the New York Stock Exchange, Midwest Stock Exchange, Pacific Coast Stock Exchange"?

A. Yes, sir.

Q. Would you describe the document and what it shows?

A. Yes. It shows the number of shares stated for the years—for all of these exchanges for the years 1961 through ten months of the year 1964. That is as far down as the date—as we could bring it. Those shares so traded during that period, the total number of transactions. That is what it comes to. 16,499,302 shares were traded in over that period. That is out of an average, roughly, number of shares outstanding over that period of somewhere between 22 million eight and 22 million nine, somewhere along in there.

Q. Just for the convenience—

A. Yes, the average for the 46 months, the average number of shares traded for the full 46 months we are talking about, was 4,495,118—no, I read the wrong figures—358,680 shares; in other words, the total number of transactions in El Paso stock on the average for that full period we talked about was 358,680.

Now there is an interesting further—well, the annual [fol. 454-47] average for the period was for—not including 1964, because you didn't have the whole year—was 4,597,-118, and the annual average for the full period using the ten months is not significant, but it is 4,304,160. But there is an interesting fact that for the lowest month and the highest month the figures are: for the lowest month, which

was April, 1963, only—the quantity traded was 104,400, 104,400 shares, whereas the highest amount traded was in December, 1962: 661,200.

The interesting fact in that regard is: Why was that true?

Well, we reduced our dividend at about the time, that is, in December or November, and, of course, there was a tremendous turnover of El Paso stock. And then by April —that was in December, 1962. By April, 1963 the storm had settled down and everybody had sold that was going to sell and everybody had bought that was going to buy, so the trading was at its lowest ebb, 104,400 shares for a month.

Q. Now, may I ask you, Mr. Kayser, at that point whether the figures you have just related are the entire figures of trading transactions during that period, for an amount that these figures relate to the New York Stock Exchange—

A. They represent the trades that occurred on those stock exchanges, those that we gave you, and they do represent those trades. Those are the three exchanges upon which the [fol. 454-48] stock is listed; and if there were any other trades other than that it would be comparatively insignificant.

Q. Well, looking down then at this exhibit, at the lower part of it, the number of shares transferred, will you indicate what that means?

A. Yes. For June through November we took the total number of shares.

Q. 1964, is that right?

A. Yes. That is during the year 1964. Which we got from the transfer agent, which of course includes all transfers, including the ones we talked about up above. And for that period the total transfers were 3,622,213, and the monthly average was 603,702.

Mr. Harrison: We offer the document in evidence, may it please the Court.

Mr. Lipson: Your Honor, may I see the document?

Mr. Harrison: I am sorry.

Mr. Lipson: So I may have an opportunity to object to it.

Your Honor, may I have the privilege of asking a few questions?

Mr. Harrison: I am through with the witness, so you may cross-examine.

Mr. Lipson: Then I must object to the document, unless I have a chance—

[fol. 454-49] The Court: I think he is entitled to voir dire the witness if he wants to before we receive it.

Voir dire examination.

By Mr. Lipson:

Q. Who prepared this document, Mr. Kayser?

A. It was prepared under my direction. I did not do the actual preparation.

Q. Now, I notice at the very top—do you have a copy of the document in your hand, sir?

A. Yes. I have the one I was just reading from.

Q. The total number of shares traded is given as 16 million dollars, and that is over the entire period from 1961—

A. Sixteen million shares.

Q. I am sorry, sir. 16,499,302 shares. That is over the entire period?

A. That is correct.

Q. 1961, 1962, 1963 and the first ten months of 1964?

A. That is correct. In those three stock exchanges.

Q. Right. In what way can you determine whether the same shares were traded more than one time during this period?

A. No way. It doesn't pretend to do that. It simply shows the magnitude of the trading in El Paso stock.

Q. The same shares could have been traded a multiple number of times to arrive at this figure?

A. No question.

[fol. 454-50] Mr. Lipson: I have no objection to the document.

The Court: Received.

(The document marked Defendant's Exhibit "E" was thereupon received in evidence.)

Mr. Harrison: We have concluded our direct examination.

Mr. Lipson: I am sorry. I missed that, sir.

Mr. Harrison: That ends our direct examination.

Cross-examination.

By Mr. Lipson:

Q. Mr. Kayser, do you have any figures at your disposal indicating the number of shareholders of El Paso common stock that own 300 shares or less?

A. No, I don't think we have made that calculation. We cut it off at 200 and less.

Q. May I ask why you cut it at 200?

A. Well, because, generally speaking, your wide distribution would be found in 200 and less. There was nothing sacred about the 200. We could just as well have taken 300.

Mr. Harrison: We will be perfectly glad to obtain those figures for you, Counsel.

Mr. Lipson: Thank you, Counsel. I would appreciate if it could be made available.

The Court: Do you have any particular point about it?

[fol. 454-51] Mr. Lipson: Yes, your Honor. May I bring it out in questioning Mr. Kayser?

The Court: Yes.

By Mr. Lipson:

Q. Do I take it from your comment, Mr. Kayser, that the distribution narrows abruptly at 200 shares?

A. I wouldn't say "abruptly," but you can see that the 100-share spot seemed to have been the place where you

had a very large number of shareholders holding exactly 100 shares. When you went below that, you got down to one, you got twice as many as you got at 59, better than twice as many.

When you go up from that to the 200, if I remember the figure rightly, there was something like 17,000 shares at 200 and to 101. So you have a decline in the number of shareholders as you go up in the quantity held.

Q. Does the rate of decline in the number of shareholders increase substantially over the three or four hundred share mark, over the 200 share mark?

A. I don't think that—well, I have never made a chart to show what the rate of decline is, but just from general consideration, the rate of decline is going to be somewhat substantially related to the number of shares.

Q. Well, if we go up to the number of shareholders of El Paso common stock that own a thousand shares or more, this would represent, would it not, a very small fraction of those who own a hundred shares or less?

[fol. 454-52] A. A substantially small fraction, yes.

Mr. Lipson: Your Honor, if it is possible to do so and not a burden on counsel, I would like to be able to obtain the figures ranging in the hundreds from 300 to a thousand shares. Mr. Harrison has offered to make these figures available to us.

Mr. Harrison: We will do our best as soon as we can.

Mr. Lipson: Thank you.

Mr. Harrison: You mean you want it broken down up to a thousand shareholders at 100 breaks?

Mr. Lipson: If it is convenient for you to do it, I would appreciate receiving it.

Mr. Harrison: I think we can do it.

By Mr. Lipson:

Q. Mr. Kayser, are there any present members on the El Paso Board of Directors who are not nominated by the corporation itself?

A. Who are not nominated by the corporation itself?

Q. Yes, sir.

A. Well, I don't know what you mean by "nominated"—

Q. Are all the El Paso directors sponsored by the corporation when it comes time for the shareholders to vote on them?

A. Well, I still don't know what you mean by "corporate action." I am not sure which way you call it, but generally speaking—and I think this is true of all corporations [fol. 454-53] —as the time for the election of directors occurs, the management makes up a slate, and that slate obviously is after consultation with the directors and is in connection with all the directors. Insofar as corporate action is concerned, I don't think corporate action is taken. Maybe it is. I don't know.

Q. May I rephrase the question, then, Mr. Kayser. Are there any members of the El Paso Board who are not on this management slate that you just represented?

A. Oh, yes. We have members of the El Paso Board who are not officers.

Q. I didn't ask you if they were officers. Were they on this management slate that you referred to?

A. I didn't refer to a management slate. The slate is the list of persons that we submit to the stockholders to vote on for directors. That slate is made up by the management in consultation with the Board. That is all—

Q. Are there any corporate directors of El Paso whose names did not appear on such a list as you described?

A. No.

Q. When did you first become associated with El Paso, Mr. Kayser?

A. I was one of the organizers in November, 1928.

Q. And have you been on the Board of the corporation ever since?

A. Yes, I have.

[fol. 454-54] Q. And are there any present members of the El Paso Board with service as long as yours, sir?

A. I don't believe so. I think that my service is the longest of anyone who is on the Board or who is an officer.

Q. Have you been on the Board continuously since that time?

A. I have, yes.

Q. Do you know whether there are any members on the El Paso Board at this time that have been on the Board for a period of approximately 20 years or more?

A. Yes.

Q. About how many of the Board, sir? You can refer to your 1962 annual report if it might help you.

A. Yes. 1962?

Q. I am afraid I don't have the 1963 at hand, sir.

A. Do you want me—

Q. I have the 1963 annual report, if you prefer referring to that.

A. One is just the same as the other in this respect. You want me to indicate the ones who have been on there for as much as 20 years?

Q. Yes, sir, I would.

A. I have been—you are right. I ought to take the '63, because there was a change at that spot. Mr. Liddell—now, without going back and getting the record—yes, Mr. Grambling, Mr. Perkins. Those are all that I would be willing to say without looking at the record who have been on there [fol. 454-55] for 20 years.

Q. Are there any members of the El Paso Board that have been on the Board for fewer than five years?

A. I would want to take a look at the record. I don't remember with accuracy who have been on the Board only five years or less than five years.

Q. Five years or less.

The Court: I should think the records would show that.

A. It is possible that Mr. Young and Mr. Lawrence Arnold have been on there for less than five years.

Q. They are probably the only ones, is that it?

A. I think that is right. That is my memory, yes. That is my memory at the moment.

Q. As a rule do members of the El Paso Board stay on for long periods of time?

A. Do what?

Q. As a rule do members—

A. Oh, yes, that is correct.

Q. Mr. Kayser, you testified with respect to certain items on the balance sheet of the New Company in your examination on the 19th?

A. Yes.

Q. Let me give you a copy of Defendant's Exhibit which I understand was marked "A" on the 19th, which is probably [fol. 454-56] marked 1 now, and ask you to refer to the balance sheet.

A. Yes, I have it before me: Assets sheet and liabilities sheet.

Q. That is tab what?

A. A Tab 1 in the list I have.

Mr. Harrison: You mean Tab 11.

By Mr. Lipson:

Q. Yes, Tab 11 is what I was referring to.

A. Oh, I beg pardon. I see this is a list of asset transfers. My mistake. That is Tab 11.

Q. Sir, there is one item that I wish you would explain on that balance sheet under the asset side. You have an item called "Working Funds, $250." What does that represent?

A. Wait a minute, let me find it. "Working Funds." I haven't the slightest idea.

Q. May I direct your attention to the item just above it called "Cash," where the figure is $4,486,127?

A. Yes, that's right.

Q. From what source would the New Company receive this cash?

A. You will find on the liability side notes payable to banks, five million dollars. That represents the proceeds of that loan. Now, why it should be slightly less I don't know.

Q. That would be an indebtedness of New Company, is that right?

A. That is right, just like the balance sheet shows it.

Q. And the indebtedness would be in excess of the bonds [fol. 454-57] that you intend to transfer over to New Company as a part of your divestiture plan?

A. You mean the total—obviously, if it borrowed the five million dollars, it would show on the balance sheet just as we have shown it, and it would be a long—it would be the liability along with the bonds and debentures.

Q. I am sorry to interrupt you, sir. Do I understand you to mean, then, that when this corporation was formed, or shortly thereafter, it will then have to go to a bank to secure a bank loan in order to get the operating cash to run the business from day to day?

A. That's right.

Q. Do you have any idea about the interest rates to be charged on this loan, or is that possible—

A. Yes, I think it is highly likely that this company will get the prime rate. If not, it will be slightly in excess of it.

Q. May I ask whether this indebtedness, this five million dollar bank loan, would be required had the company an additional liquid asset that could easily be turned into five million or more in cash?

A. No question about that.

The Court: Read that back, Miss Reporter.

(Question read.)

The Court: I don't understand the question. Ask it [fol. 454-58] again.

Mr. Lipson: Yes, your Honor.

By Mr. Lipson:

Q. Assuming that the New Company had an asset that it could easily liquidate and receive five million dollars for or more than five million dollars for, it wouldn't have to secure the loan from the bank at all?

The Court: Well, that is obvious.

A. Exactly.

The Court: I don't think you have to ask Mr. Kayser that one.

Mr. Lipson: I agree, your Honor.

The Court: If they have the money to pay it, they pay it; if they haven't the money to pay it, they have to get it, and they get it from a bank. But if they have a liquid asset they can raise five hundred dollars on, they get it; if they can get it that way, they don't have to go to the bank.

Mr. Lipson: Yes, your Honor, I don't take issue with it. I just wanted to bring out that point as a foundation for some questions, if I may.

By Mr. Lipson:

Q. Pacific Northwest, when it was acquired by El Paso, had a stock interest in Westcoast Transmission Company, Ltd., did it not?

A. Yes.

Q. And Westcoast Transmission common stock is traded in the New York stock exchange, is it not, sir?

[fol. 454-59] A. No, not then.

Q. Is it traded on any exchange?

A. No.

Q. I am sorry, sir. I am referring to this day at this time.

A. At this time, yes. It is listed on the New York Stock Exchange at this time.

Q. Do you know the number of shares that Pacific Northwest held in Westcoast Transmission at the time you acquired the company, sir.

Q. Is it roughly in excess of a million shares?

A. That's right.

Q. Do you know the price in general terms—and I won't hold you to specifics—for which Westcoast Transmission is currently being traded on the New York Stock Exchange?

Mr. Harrison: We will present that information on direct examination with the next witness, if that will assist you, Counsel.

By Mr. Lipson:

Q. Well, for purposes of my question, would roughly $16 be in the neighborhood?

A. Yes.

Q. Sixteen dollars per share. As part of your divestiture plan, I understand that El Paso plans to liquidate the holdings of Westcoast Transmission stock that it acquired from Pacific Northwest.

A. Right.

[fol. 454-60] Q. How much does it intend to receive for that?

A. Whatever can be realized.

Q. Have you made any estimates of what you can sell it for?

A. Well, not with enough accuracy for me to be willing to testify that that is what we will get for it, because that is a thin market on the exchange, American exchange, stock exchange, and it is—if you want to dump that much on the market, you wouldn't get anything like the present price.

Q. Have you made representations to your bond holders about the expected amount of proceeds from this sale, sir?

A. I am sure that we have called their attention to the fact of the market for it.

Q. Do you recall whether or not you have made representations that the after-tax income on the sale of the Westcoast Transmission stock would be in the neighborhood of 14½ million dollars?

A. That is on the assumption of being able to sell it at the market that existed—about the market price that existed about the time the representation was made.

Q. About what time was that?

A. Sometime after April 6.

Q. Of this year?

A. Somewhere along there, May, June, of this past year. But it would be upon the assumption that it could be sold. Whether or not it can be is a problem that nevertheless it [fol. 454-61] is all right to make an assumption that it could be sold at that.

Q. And the differences would be a million dollars or less, or would they be to a larger extent?

A. I wouldn't want to say what it would be, because the job of selling it is a job. Don't make a mistake about that.

Q. I understand, sir. Do you still have a divestiture plan in front of you, Mr. Kayser?

A. No, I don't believe I have it with me. This is it here.

Q. That is the copy we received.

A. Yes, this is it.

Q. I am sure it is the same plan.

A. Right.

Q. Would you please turn to that portion of the Page No. 2 at the bottom—

A. Tab No. 2?

Q. Not tab, but Page No. 2. It is at the very beginning, if I may direct your attention to it.

A. I understand.

Q. Now, at the bottom of that page and succeeding Page No. 3 you describe four different methods by which El Paso proposes that New Company's common stock would be distributed, is that correct?

A. Yes.

Q. And the four methods of listing on Page No. 3.

A. That's right.

[fol. 454-62] Q. Which of these four methods does El Paso propose to use in actually making the distribution?

A. Well, we propose to do whatever method will yield the least liability for income tax.

Q. Well, let me direct your attention to Item No. 1 of 4, "A single distribution of the common stock of New Company to the holders of common stock of El Paso." It is my understanding that that would probably be a completely tax free—

A. That's right.

Q. (Continuing)—distribution. Is that your understanding, too, on advice of counsel, sir?

A. Yes.

Q. Well, then, need you consider the remaining two, three, and four?

A. There are certain difficulties about making the complete distribution at once.

Q. Would you describe—

A. Tax problems that arise out of it—as a matter of fact, not tax problems. The tax problem is simple. But the question of consents of security holders is involved.

Q. Have your security holders objected to No. 1?

A. We have not contacted nor gotten consents from the security holders that would be involved—yes, that would be involved in the complete distribution.

Q. Then you haven't decided that whether or not to use [fol. 454-63] No. 1, do I understand that?

A. That is correct.

The Court: As a matter of fact, the Court is going to have to pass on the plan before this choice is made.

Mr. Lipson: I understand that, your Honor.

The Court: Well, they can't have made up their minds then.

By Mr Lipson:

Q. May I ask, Mr. Kayser, whether your plan contemplates that the court will have its full discretion in deciding whether or not to exercise the distribution under 1, 2, 3, or 4 on Page 3?

A. No question about it at all. The court has the authority to do whatever, in its judgment, is the best thing to do.

Q. Do you intend making any recommendations as to which of these four methods would be preferable from El Paso's viewpoint?

A. We would like to determine what the tax consequences are and make the representation to the court at the time we have made that determination.

Q. Might there be other than merely four methods of distributing these shares, then, that could be presented to the court at this time, subject to your future recommendations and, I assume, recommendations from the other parties in this action? Let me rephrase the question.

A. Yes, I know what you mean. The point is this: You [fol. 454-64] can express it more simply by saying that we are asking for a right to distribute it in whole or in part to our stockholders or sell it as a rights offering complete, I mean in whole, to our stockholders. The tax consequences are the things that have to be considered before you do that, plus the necessity of obtaining these additional security holders' consents.

Q. Would this court, under your plan, have discretion to decide whether to sell it to persons who are not El Paso shareholders, either by individual shareholder distribution?

Mr. Harrison: That is a question for the Court, I submit, your Honor.

The Court: I guess the Court is going to decide that one, what his discretion is.

By Mr. Lipson:

Q. Would you, Mr. Kayser, please refer yourself to the second of these methods of distribution, "A distribution of the common stock of New Company to the holders of common stock of El Paso in instalments over a period of up to three years."

How do you visualize the mechanics of that kind of distribution?

A. Well, except to distribute it over that period.

Q. In lieu of dividends—

A. There again you have tax consequences which haven't been resolved yet.

[fol. 454-65] Q. Would that be in lieu of normal dividends?

A. It might be or it might not be. It might be in lieu of part of the dividends or it might not be in lieu of cash dividends. That would be up to the directors at the time they made the distribution.

Q. The directors of what company, sir?

A. El Paso.

Q. With respect to Item No. 3, "The sale of common stock of New Company under a rights offering to El Paso common stockholders," this is a more complicated method of distribution. Would you explain the mechanics that you visualize under that possibility?

A. It is not complicated at all. It is done every day. The mechanics of it are simply this, that we would go to our brokers, our investment bankers that we generally do business with, and say to them that we want to make an offering of this stock, new stock—I mean stock of the New Company—to our own stockholders, and, "We want you to underwrite the sale so that there is no question but that it all goes out."

We have done that before. And then we offer it under what is called a "rights offering." That is, we give a right to the stockholders of El Paso to buy "X" number of shares of the New Company for each share of El Paso stock that the stockholder owns. The price at which the El Paso stockholder can buy the stock of the New Company is cus-

[fol. 454-66] tomarily set at the figure slightly lower than what the brokers tell us they can maintain as the market value of the new stock when it is distributed.

When I say "slightly," that depends upon what the directors want to accomplish in the offering. I believe in the figures that we submitted to the Federal Power Commission where we revised our exhibit in the present pending certificate cases we used a rights value of 25 cents a share of El Paso's stock.

Q. Does El Paso at this time have any agreement or any informal understanding with an underwriter to underwrite that kind of offering you have just described?

A. We do not have anything that you would call an agreement at all. We have talked to them about the feasibility of making such an offer, and they have assured us that there was nothing infeasible about it. Obviously, it would be utterly impossible to set the prices at the present time except on certain assumptions.

Q. Was this White Weld and Company that you are referring to?

A. Yes. And we also talked to one or two others of the investment bankers, but we did talk to White Weld and Company.

Q. I am sorry for interrupting you.

A. We did talk to White Weld and Company.

Q. What kind of an underwriting fee does White Weld intend to charge?

[fol 454-67] Mr. Harrison: I submit that is immaterial.

The Court: Yes.

A. I would say this: They have always been reasonable.

By Mr. Lipson:

Q. There is a fee involved?

A. Oh, yes. There is a service involved and a fee involved for it.

Q. Who will pay for the underwriting fee?

A. El Paso.

Mr. Harrison: I don't quite understand this underwriting experience. We don't have any plan. This company has no right to offer. How can they go out and make any arrangement for the issuance of right for the sale of stock? We can't do it. I don't understand what the examination is directed at.

Mr. Lipson: Your Honor, specifically in the El Paso plan on Page 3 they have described in general terms the

manner by which they intend to distribute the common stock of New Company. I think that, with respect to the competitive aspects, the manner by which this stock is going to be distributed, who shall receive it, and under what conditions, is particularly germane to these proceedings.

The Court: Well, I think so, too. Is this a good point at which to interrupt you?

Mr. Lipson: Yes, it would be, your Honor.

The Court: Recess until two o'clock.

[fol. 454-68] Afternoon Session
December 2, 1964, 2:00 p.m.

Mr. Harrison: If your Honor please, the information which counsel submitted this morning we hope will be available during the course of the business day.

At the same time I would like to suggest to the Court that we be permitted to have marked as an exhibit for identification a form of interlocutory decree for divestiture, which is being proposed on behalf of the defendant. And I have an extra copy for the Court.

We wish to call at this time the Court's attention to a paragraph which I think is particularly pertinent to the examination which is now being conducted, and I think it will facilitate it. In addition to its provisions which are incorporated in Exhibit 1 in the Court's files, we have on Page 5 a proposed clause 6:

"Defendant El Paso is enjoined and restrained from:

"(A) Except as contemplated in this Decree, acquiring any capital stock or financial interest whatsoever in New Company or any assets thereof;

"(B) For ten (10) years after the date of entry of this Decree, acquiring or holding after such acquisition, directly or indirectly, any natural gas transmission properties in the United States, or any of the capital stock, of any person engaged in the transmis-
[fol. 454-69] sion of natural gas in the United States

(other than purchases of the capital stock of any such person, except New Company, on behalf of the Employees Retirement Income Plan and/or the Employees' Savings Plan of El Paso resulting in holding by said Plan of less than one-half of one percentum of the capital stock of such person) except with the approval of the plaintiff herein or after establishing to the satisfaction of this Court, upon notice to the plaintiff, that the effect of such acquisition will not be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country;

"(C) Having any person as an officer or director who is at the same time:

"(1) an officer, director or employee of New Company;

"(2) except as provided in subsection (D) of this Section VI, the owner of any capital stock of New Company or a person a member of whose immediate family is the owner of more than one-tenth of one percentum of the capital stock of New Company;

"(D) Selling, transferring, issuing or in any manner distributing any of the capital stock of New Com- [fol. 454-70] pany to any person who is at the time an officer or director of El Paso or to any person who at the time owns beneficially more than one-half of one percentum of the capital stock of El Paso or to any person who is a member of the immediate family of the foregoing or to the Trustee or Trustees of the Employees Retirement Income Plan and the Employees' Savings Plan of El Paso, provided, however, the stock any such person would otherwise be entitled to receive shall be delivered to and held by a Trustee, so long as such ineligibility exists, for the account of such person under an agreement of trust irrevocably providing that

such shares shall be voted by the Trustee only in accordance with instructions received by the Trustee in writing from the Board of Directors of New Company, and provided that the Trustee at the end of ten years, or earlier at the request of the owner, shall dispose of the legal and equitable interest of any person who is an officer or director of El Paso, and thereupon account to such person.

"(E) Employing, during a period of five years from the date New Company shall first start service, any employee of New Company without first obtaining the consent in writing of New Company."

I might say that that paragraph, as well as other parts [fol. 454-71] of this proposed decree which was tendered to the court, was worked out in recent conferences with the United States Department of Justice, even though we did not ultimately agree upon it.

Mr. Sabin: Your Honor, I would like to be furnished with a copy of that.

The Court: Well, now, Counsel, if you want any copies, you arrange with the proper office on the second floor of this building.

Mr. Sabin: Very well, your Honor. May I ask at this point whether we are going to be afforded the opportunity of commenting upon this?

The Court: No.

Mr. Sabin: We are not.

The Court: You fellows are not parties to this lawsuit yet.

Go ahead.

(Defendant's Exhibit "F" was thereupon marked for identification.)

PAUL KAYSER resumed the stand and testified further as follows:

Cross examination (Contd.).

By Mr. Lipson:

Q. With your Honor's permission—Mr. Kayser, do you have a copy of Defendant's Exhibit "F" from which Mr. [fol. 454-72] Harrison was just reading before you?

A. No.

Q. Would you turn to Page No. 4 of that document, sir? I am referring specifically to Paragraph D and to Subparagraphs 1 and 2 under that.

A. Yes, the first two paragraphs. The first paragraph on that page is the subsection.

Q. That relates, does it not, to the four methods of distribution we were discussing earlier this morning?

A. I don't—oh, let me see.

Q. Maybe you don't have the same page.

A. I understand, but I was just studying as to whether it does or not. The distribution that we have provided for, the four methods which you refer to—this paragraph is a restriction upon what may be done and who may receive it and what has to be done if certain persons do receive it, namely, if they are directors or hold as much as one-half of one per cent, the stock of the New Company has to be pledged irrevocably in trust, and the voting power has to be passed to the trustee.

Mr. Harrison: I submit the document speaks for itself. I object to questioning the witness on the interpretation of the document.

Mr. Lipson: I wasn't intending to question him on the interpretation of the document, but under Paragraph D and Paragraphs 1 and 2 thereunder it appears as though a [fol. 454-73] choice has been made among the four possible forms of distribution that are listed on Page 3 of El Paso's Exhibit "A".

Mr. Harrison: Counsel is very familiar with this exact language, and I think he will find he is wrong, and they speak for themselves.

Mr. Lipson: Is it your understanding, then, that the four possibilities are still open possibilities?

The Court: No, I am not going to let you interrogate Mr. Kayser about the meaning of that document. There it is. The document speaks for itself.

By Mr. Lipson:

Q. Mr. Kayser—

The Court: You have been a party to the negotiations concerning it, I suppose.

Mr. Lipson: Yes. I was present at the negotiations, but obviously I didn't understand precisely what was going on.

By Mr. Lipson:

Q. Mr. Kayser, may I hand you a document Government's Exhibit marked No. 1 for identification.

A. Yes, sir.

Q. That purports to be a list of the holders of the common stock of El Paso Natural Gas Company at the close of business on April 24, 1964, but limited only to those holders of 5,000 shares or more.

A. Right.

Q. This document was prepared by your transfer agent, wasn't it, the Chase Manhattan Bank?

[fol. 454-74] A. Yes.

Q. At your request?

A. Right.

Q. Now, referring to the very first entry of that document under Mr. Kenneth S. Adams, Jr., that indicates, does it not, that he holds 141,342 shares of El Paso common?

A. That's what it says.

Q. Now, under the El Paso divestiture plan how many New Company common shares would Mr. Adams have the

right to obtain, either by direct distribution or through a rights offering?

Mr. Harrison: May I ask that the question be read.

The Court: Read it.

(Question read.)

Mr. Harrison: Well, in the first place, if the plan is clear, then this is a mathematical computation. I don't understand what counsel wants to prove.

The Court: What is your problem, Mr. Lipson?

By Mr. Lipson:

Q. Is it a fact, then, that he would obtain 141,342 shares of New Company?

A. No. It is comparatively simple. If there is a straight-out distribution—let us assume that first—of course, this is not an assumption; this is a fact. El Paso has 23 million shares plus outstanding—approximately—not plus but approximately. Let's assume that the New Company has half [fol. 454-75] as many shares as El Paso; in other words, that it has about 11 million one. Then a shareholder obviously of El Paso would receive one share of stock in the New Company for each two shares of stock that he owned in El Paso. That is the only way you can make a distribution.

Q. That is, his proportionate ownings in New Company will be precisely equal to his proportionate ownings in El Paso?

Mr. Harrison: So stipulated, your Honor. So stipulated.

A. That would not be true in a rights offering.

By Mr. Lipson:

Q. In what respect would it differ under a rights offering?

A. Because a rights offering frequently, and it is general practice—the stockholder who received the right, he doesn't receive the stock, he merely receives a right to buy the

stock. He sells that right without ever exercising it and without ever owning any stock, but the right to buy is evidenced by that price.

Q. He would have the right to purchase an exact amount?

A. He would have a right to purchase it, yes, but he wouldn't at any time have the stock where he sells the right.

Q. But there would be no compulsion on him selling the right?

A. No. I am just talking about what happens generally.

Q. The description of what would happen to Mr. Kenneth Adams' shares would hold true for the remaining persons [fol. 454-76] and accounts listed in this document, would it not?

A. Yes. It would hold true for all stockholders.

Mr. Lipson: There is no use going through that.

By Mr. Lipson:

Q. Mr. Kayser, would you turn to the entry on I believe it is Page 6 under the "Kayser Foundation." That owns some shares in El Paso, does it not?

A. What is the page?

Q. The "Kayser Foundation."

A. I mean what page are you talking about?

Q. I believe it is Page 6.

A. I will find it. These are in alphabetical order, aren't they?

Q. Yes, they are.

A. Yes, I see that.

Q. Who exercises the voting right for the El Paso shares held by the Kayser Foundation?

A. The trustee, of whom I am the chief trustee.

Q. Are you on the committee, if there is one, that determines how these shares will be voted?

A. Yes.

Q. Are they generally voted for the management slate of El Paso directors?

A. Yes.

Q. And the Kayser Foundation would receive also a proportionate number of shares in New Company stock?

[fol. 454-77] A. Yes. We would expect, however, the same restriction on this stock as we had on our own.

Q. When you say "our own," what are you referring to specifically?

A. My own, which shows in the next line, that is, the next block, next ownership, and likewise the other that are of my immediate family.

Q. When you speak of restrictions, here, are you referring to the same restrictions Mr. Harrison talked about when he spoke about the trustee?

A. That is what we are talking about, yes, sir. I am saying that.

OFFER IN EVIDENCE

Mr. Lipson: Your Honor, I would like at this moment to offer this document, Government's Exhibit No. 1, in evidence.

(Plaintiff's Exhibit No. 1 was thereupon marked for identification and received in evidence.)

Mr. Lipson: The Government's exhibits in the trial were numbered numerically, and we would assume the Government's would continue to be numbered numerically and the defendants' alphabetically.

The Court: What you ought to do is work out with the clerk a proper numbering system. I don't care how they are numbered. Let's just be sure we are keeping them straight.

Mr. Lipson: Your Honor, for the purposes of the rec-

[fol. 454-78] ord I would just like to point out that in Government's Exhibit 1 there are listed, by my count, 322 accounts that own 5,000 shares or more of the El Paso common stock as of the date thereon.

By Mr. Lipson:

Q. Now, referring to the trust arrangement that your plan contemplates with respect to these New Company shares, Mr. Kayser, would you describe to the Court the nature of that trust arrangement that you contemplate?

A. Yes. It would be an irrevocable trust giving to the trustee irrevocably the right to vote the shares of stock.

Q. And the shares that would be put into the trust would constitute the shares of the management of El Paso—that is, the New Company shares to which the management of El Paso would be entitled?

A. That is right, plus the shares of stock of any—and when you say "management," I assume you include the Board of Directors.

Q. Yes, sir.

A. Plus the shares of stock of anyone who owned as much as one-half of one per cent of the stock of El Paso.

Q. Now, in terms of number of shares outstanding, I take it that one-half of one per cent would be 115 shares of El Paso common stock?

A. That is just about right.

Q. And with respect to someone like Creslenn Oil that [fol. 454-79] own 56 shares of common stock less than the 115,000, their shares would not be trusteed? Would you check that?

A. It doesn't need checking, I don't think. I mean it applies—the trusteeing of the stock applies to every stockholder who owns as much as one-half of one per cent, that is, owns roughly—as much as 115,000 shares. It does not apply to anybody else.

Q. The present market value—

A. No, that is not correct. It applies to all stock of the officers and directors.

Mr. Harrison: May I again suggest to the Court that there is no purpose in this witness' trying to interpret this document, which is perfectly familiar to counsel and which I can argue with him at any time. The exhibit con-

tains the names, and we can read them, and the number of shares, at any time. 114 is less than 115. I don't understand the purpose of the examination.

The Court: What are you getting at?

Mr. Lipson: Your Honor, I would like to bring out the following facts, if I may, that El Paso common shares are traded, roughly, for around $23 on the exchange now. At the 116,000 breaking point, at which the shares will be traded, represents something in the neighborhood of two and a half million dollars.

The Court: You don't mean "traded"; you mean "trus-
[fol. 454-80] teed."

Mr. Lipson: Trusteed, your Honor. And this, from the Government's viewpoint, would allow persons with, say, 2.4 million dollars interest in El Paso to have an equivalent proportionate interest in the New Company. We think that this would give the Government less than adequate relief in setting up New Company as an independent entity free and available to compete with El Paso. We feel that under the case law that has been developed by the Supreme Court this would establish what the Supreme Court has referred to as a community of interest, and it would not be a community of interest merely of the insignificantly small shareholders owning 10, 20, or 100 shares of El Paso stock, but it would be a community of interests that would include large blocks of shares owned by relatively few individuals and managed by relatively few accounts.

Mr. Harrison: Well, your Honor, I recognize that counsel is perfectly entitled to make that contention, and in due course I would like to answer it, but I don't see any use of this witness' being kept here to make calculations or prove facts that are obvious, that is all.

The Court: The document shows those matters, doesn't it?

Mr. Lipson: It doesn't speak in terms of the dollar value, your Honor, and I think it would be important and [fol. 454-81] significant for the record to show what the dollar value is.

Mr. Harrison: I have not examined this witness upon the market value of the stock, if your Honor please. When you are talking about the market value of the shares in quantities, you know perfectly well you just don't take the listing for today and multiply it. At any rate, he is not an expert on this subject.

Mr. Lipson: Mr. Kayser is Chairman of the Board of the El Paso Natural Gas Company. I would assume that the Chairman of the Board would be familiar with the price that his shares are traded on over the exchange.

The Court: The price those shares are traded is subject to all kinds of public services. I don't think you need to ask this witness about that.

Mr. Harrison: The Wall Street Journal has it today.

Mr. Lipson: Your Honor, I—

The Court: This is a problem of no difficulty, it seems to me, Mr. Lipson. We have a lot of matters that are going to take a lot of time, and I think we are unnecessarily consuming time here over something that you can get by making a phone call. Call Polk. You have somebody at the table? Call Polk and find out what selling price is. Multiply it by the outstanding shares. This is arithmetic.

Mr. Lipson: Could I just establish through Mr. Kayser that the selling price of El Paso common shares in recent [fol. 454-82] days is between 20 and 23 on the market?

The Court: There is someone going out of the courtroom to make a phone call. We will tell you what it sold for today in just a minute or two, Mr. Lipson.

Mr. Lipson: I would be willing to send someone out.

The Court: Someone has already gone.

Mr. Lipson: Thank you, your Honor.

By Mr. Lipson:

Q. Who would nominate the trustee under this trust, Mr. Kayser?

A. Anyone that the Court approves. We have in mind someone like Chase Bank.

Q. You would nominate the trustee subject to the Court's approval?

A. We would suggest it. We haven't any right to nominate.

Q. Chase is your agent, is it not?

A. What?

Q. The Chase Bank is your agent?

A. No. You asked me if they were my agent. You didn't ask me in what particulars. I say generally no, they are not my agent.

Q. But on certain occasions they do act for El Paso?

A. In certain particulars only.

Mr. Harrison: I can't hear you.

Mr. Lipson: I will speak louder, Mr. Harrison.

By Mr. Lipson:

Q. Will the trustee under your plan be free to buy and [fol. 454-83] sell the New Company shares?

Mr. Harrison: Well, the trustee under his plan—are you referring to trusteed shares we are just referring to?

Mr. Lipson: If the witness doesn't understand the question, I will try to rephrase it.

The Witness: I understand it.

The Court: Mr. Lipson, his counsel is entitled to rise and address the Court, and that is what he is doing. He wants to find out what your question is related to.

Mr. Lipson: The question is related to the powers that this trustee will have with respect to these New Company shares and whether or not the trustee will be able to exercise his independent discretion on buying, selling, trading, and otherwise exchanging these New Company shares.

Mr. Harrison: Well, once they sell them I guess the beneficial owner has no further interest in them and, until that time, they are voted as the Board of Directors of the New Company directs, and that is what the agreement says.

Mr. Lipson: What agreement, sir?

Mr. Harrison: I beg your pardon. It wasn't an agreement. It almost was, though. It is the proposed decree.

The Court: Don't give up hope. The Court hasn't participated in those negotiations yet.

[fol. 454-84] Mr. Lipson: Your Honor, I submit the decree, under Paragraph "D"—I submit it certainly isn't clear as to whether or not the trustee will have power under this arrangement to buy, sell, exchange, or trade New Company shares at his own discretion.

The Court: Hand it back to Mr. Lipson. If there is anything in it you want me to see, read it to me.

Mr. Lipson: It is an omission in the decree, your Honor, and I would like to bring out this information through the witness, if I may.

Mr. Harrison: It is all here, if your Honor please. The witness doesn't have to tell him.

The Court: He says it is an omission, Mr. Harrison.

Mr. Harrison: Everything that is not there is omitted, may it please the Court. I don't understand it.

By Mr. Lipson:

Q. Mr. Kayser, will you look at Paragraph "D" of this decree on Page 6 of the proposed decree.

Mr. Harrison: May I suggest to the Court that this is a legal question as to what the meaning of this proposed decree is. The purpose of the trustee is to hold. All he can do is hold as directed and sell as directed. And that is plainly is set forth. And to reexamine the witness on what is plainly stated in black and white, it seems to me, is just a waste of time.

Mr. Lipson: If I can take the information counsel just [fol. 454-85] offered as part of the record, I would like to proceed from that point, your Honor. If the trustee can only hold as directed, I would like to ask Mr. Kayser—

The Court: No, we are not going to pursue that with Mr. Kayser. There is a document here which is a proposed interlocutory decree, and I suppose it says what it means

—it means what it says, and we can read it and you can read it. You can read it to me, and you and Mr. Harrison may have discussions with regard to what it means. But this witness was not examined on direct examination on any of these subjects at all. This is outside the scope of the direct examination and, I think, really asking the witness to interpret a written document, which is a question of law really, so unless you are going to get at something else, I don't think we ought to pursue this.

Mr. Lipson: Your Honor, this document, Defendants' Exhibit No. "F" was put on while Mr. Kayser was on the stand, by Mr. Harrison. I assume it is part of Mr. Kayser's testimony.

Mr. Harrison: It was only for identification, may it please the Court. I didn't make it part of his testimony.

Mr. Lipson: If it is only for identification, then I will continue my examination without reference to the document, if I may, your Honor.

By Mr. Lipson:

Q. Does your plan, Mr. Kayser, contemplate any kind [fol. 454-86] of trusteeship arrangement?

A. Yes.

Q. What will the powers of the trustee be under this arrangement?

Mr. Harrison: I object to it as outside the scope of the direct examination.

The Court: Sustained.

Mr. Harrison: Incompetent, irrelevant, and immaterial.

The Court: Sustained.

Mr. Lipson: Your Honor, do I understand that you have ruled that I cannot pursue this line of questioning?

The Court: I have sustained an objection to your last question, Mr. Lipson.

Mr. Harrison: I am informed that the stock is selling today for 22.

Mr. Lipson: Thank you, Mr. Harrison.

By Mr. Lipson:

Q. Will the trustee, under your trust plan, have the full power to sell the New Company shares at the trustee's sole discretion?

Mr. Harrison: The witness has no plan, may it please the Court. I don't recall the witness having testified to any plan. I don't know what plan counsel is referring to. If he has one, we would like to see him present it.

Mr. Lipson: Your Honor, may I respond to that. The [fol. 454-87] defendants' plan, Defendants' Exhibit "A", "El Paso Natural Gas Company Proposal for Divestiture," contemplates a trustee arrangement being set up. Mr. Kayser has just testified to that.

I would like to pursue this matter and to determine just what this trust arrangement is going to consist of, which is particularly important from the viewpoint of the competitive aspect of this case, and whether or not New Company, as constituted under the proposed plan El Paso is submitting, will truly be an independent company with an independent ownership not identified with the El Paso ownership.

The Court: Well, I am very much interested in that subject, but I am not clear as to whether we ought to develop it through Mr. Kayser's testimony.

Mr. Harrison: The plan is, of course, the plan presented by this defendant here. It is all in writing. It has been before counsel for months, and all of us are thoroughly familiar with it. I don't see what aid it will be to the Court to have the witness try to remember what is in it.

Mr. Lipson: Your Honor, if there is a description of the trust plan in Defendants' Exhibit "A", I will cease this line of questioning. The reason why I am pursuing it is because there is no such description, and I think it is [fol. 454-88] vital from the Government's viewpoint in determining the antitrust nature of this case to find out what is going to be provided for that.

The Court: Before I approve any plan, we are going to have to have the information you are talking about, of course. Now, I don't know—Mr. Harrison, is there any detailed plan of this trust spelled out, any detailed exposition of the trust?

Mr. Harrison: My recollection, if it please the Court, is that the plan, which is Exhibit "A", does not contain the specific detail that is contained in the proposed decree, but merely to clear the general principle that the New Company would have independent and competent management. It is in the proposed decree that this is implemented to spell out the manner in which the stock transmitted to the large stockholders would be controlled.

The Court: Are the provisions and terms of the trust spelled out in your proposed decree?

Mr. Harrison: The terms of the trust are very simple, may it please the Court. The trustee merely holds title, the trustee votes in accordance with the Board of Directors of the New Company, the trustee sells when directed by the beneficial owner, whereupon the trust ends.

The Court: It is a voting trust, and the trustee with power to sell?

[fol. 454-89] Mr. Harrison: When directed by the beneficiary, and, in any event, within ten years—at the end of ten years.

The Court: And the beneficiary is New Company, I take it?

Mr. Harrison: No, the beneficiary is the stockholder who owns the stock which is subject to this limitation, and that stock goes in trust with the trustee. Stock is then voted in accordance with the directions of the directors of New Company, and the trust ends when it is directed to sell, and it must sell within ten years.

The Court: Well, that is all the power the trustee has.

Mr. Harrison: That is all. It has no power. It is merely a naked trust.

By Mr. Lipson:

uring the period of time while the trustee holds ompany shares, Mr. Kayser, who would be entitled ive the dividends on those shares?

Harrison: Beneficiary.

hat's correct.

Court: We may have to have some further detail hat trust before we are through.

By Mr. Lipson:

he beneficiary you refer to, Mr. Kayser, is the El hareholder, also?

Court: I did not understand that question.

Lipson: The answer to the last question, as I 4-90] understood it, your Honor, was, "The bene-

Court: Beneficiary.

Lipson: And this beneficiary, I would like to bring also the El Paso—or the owner of El Paso shares e proportion.

By Mr. Lipson:

that correct, Mr. Kayser?

hat's correct.

Lipson: Mr. Harrison, did I understand you to say n't pursue this. Did I understand you to say the would vote the shares in accordance with the re- ent of the Board of Directors of New Company?

Harrison: That is the way I read it. Only in ac- e with instructions received by the trustee in writ- m the Board of Directors of the New Company, is says.

By Mr. Lipson:

Q. At what date will the trust terminate, Mr. Kayser?

Mr. Harrison: On the sale of the stock or, in any event, at the end of ten years.

By Mr. Lipson:

Q. Is that correct, Mr. Kayser?

The Court: Well, now, that is getting back to precisely what the proposed document says, and I don't see any point in asking this witness to read the document.

Mr. Lipson: The document isn't in evidence, your Honor. [fol. 454-91] The Court: Well, you have it under your eye, haven't you?

Mr. Lipson: Frankly, this part of the document is quite new to me.

The Court: If he didn't put it in evidence, that is another reason for not examining him on it. If it isn't in evidence, this is not the best evidence.

By Mr. Lipson:

Q. Under the terms of the trust arrangement who would be the recipient of the shares that would be distributed after the ten-year period elapsed?

The Court: Does the document state that?

Mr. Harrison: Well, it follows as a matter of law that upon the termination of the trust it passes to the beneficiary as the beneficial owner, your Honor. After it is sold, it passes to the buyer. I misunderstood the question. There is no more trust.

By Mr. Lipson:

Q. Would the El Paso directors whose shares in New Company are trusteed or to be trusteed under your plan—would they be the recipient of shares in New Company on the termination of the trust?

Mr. Harrison: Not unless they were beneficiaries of the trust.

The Court: Well, what does the document say? We are reading a document, having the witness read it to us.

Mr. Lipson: Your Honor, I would just like to point [fol. 454-92] out that, although this document does refer to a trust arrangement, it is incomplete, and it seems to me it doesn't refer to it in the detail necessary to completely understand what this trust arrangement is.

The Court: Well, I don't think we are pursuing a very fruitful course here, to be asking Mr. Kayser what the unspelled-out, perhaps at this point unknown yet, terms of this trust are. This, obviously, in the plan was an outline of a proposal; and, of course, if you are going to have a trust in this divestiture, I am going to insist that such things as you are asking about be spelled out one way or another in that document. We would hardly draw a trust instrument, I suppose, that has a lot of holes in it.

The Court is very much concerned with the subject that you are pursuing, namely, separating the New Company from El Paso in such a fashion that there is a real competitive situation and not a controlled situation. I am just as much concerned, Counsel, in that as you are, and when we get around to it I hope you are going to help us draw that decree.

Mr. Lipson: Thank you, your Honor. I hope to be of assistance in this regard.

The Court: I had hoped that you fellows would have accomplished that by this time, but you haven't, so we will have to do it.

Mr. Lipson: Your Honor, I would hate to break into [fol. 454-93] the line of questioning of Mr. Kayser, but your last remark—

The Court: I don't want you to make any—this was not critical of you.

Mr. Lipson: No, not critical, your Honor, but I think we might be helpful at this point, and the Government has,

in fact, proposed a decree which we have ready for submission to your Honor.

The Court: Do you have one?

Mr. Lipson: Yes, your Honor, we do, but this decree, we think, takes care adequately of the problem of this community of interest here, the possibility of a community of interest arising between El Paso on the one hand and New Company on the other hand.

According to the case law as it has been developed, there are various ways this can be done. The trust arrangement —I would just like to remark to your Honor at this time— or a trust arrangement similar to the trust arrangement proposed here, has been rejected by the Supreme Court in a relatively recent case in deciding the nature of the separation btween DuPont and General Motors.

The Supreme Court at that time went into the matter in some detail, and even though a relatively small proportion of the total number of shares of the company that was involved in that case would be subject to common ownership between the General Motors and the DuPont shareholders, nevertheless the Court found that even that [fol. 454-94] relatively small proportion of ownership was not satisfactory in terms of the antitrust laws, because, in a larger sense, the purpose of a decree in a divestiture case such as this is, to use the Court's own language, to pry open the market to competition that didn't exist beforehand, and, with the best of intentions, an independent management of New Company would, we think, be less likely to offer real competition to El Paso if he was aware that a substantial number of shares of his company was owned by the same person who owned an equivalent number of shares of El Paso or who were entitled to an equivalent number of shares in his company.

Mr. Harrison: May I suggest to the Court that I would like very much to have a copy of the Government's proposed decree, and I would also suggest that I prefer to discuss the DuPont case on the law after the witness has been disposed of and we get him off the stand.

Mr. Lipson: Your Honor, the remarks I made were merely in regard to showing the relevancy of going into this line of questioning concerning this trust arrangement that would hold a considerable block of shares in the New Company.

We are interested in determining to what extent the trustee would be beholden to El Paso or to persons who are beneficial holders of El Paso stock.

The Court: I suppose the only place to find that out—[fol. 454-95] well, the starting point is the document. Any objection to giving counsel a copy of your proposed decree?

Mr. Lipson: No, sir. We just thought it would be premature at this stage to offer a decree.

The Court: I think it is a very good idea to exchange these suggestions. Maybe that is why we haven't gotten farther.

Mr. Lipson: With your Honor's permission, I would just like to make a remark with respect to the Government's proposed decree, and that is that the Government does not view this proposed decree as being the only acceptable solution. We realize that the Supreme Court has sanctioned various types of arrangements that would split off two companies required to be split apart; and, while an outright sale to a third party is one such arrangement, another such arrangement has been approved of by the Supreme Court in the past, and we think would meet with the requirements of law. And the mind of man is fertile enough to envision other arrangements as well. And while we put forth this proposal of a possible sale to a third party, or consideration of a sale to a third party—

The Court: Is that your proposal?

Mr. Lipson: Generally, your Honor.

The Court: Is that your proposal, a sale to a third person?

[fol. 454-96] Mr. Lipson: Your Honor, our proposal is basically that third parties should have an opportunity to present a purchase plan to this Court and that, if it meets

with this Court's approval, they could then go to the Federal Power Commission to apply for certification.

The Court: We have troubles enough without inviting purchasers in here. Let's see what we can do with the situation we have first.

Mr. Lipson: Yes, your Honor. I would like to pursue it if I may.

The Court: If word got out of this courtroom this afternoon that a 250 million dollar corporation was for sale, representing New Company, which roughly represents the Pacific Northwest gas pipeline before its merger; and inviting one and all to come in, I think we are doing something that is hardly prudent.

Mr. Lipson: Your Honor, I would just like to make a specific reference at this time to another alternative.

Mr. Harrison: Out of deference to the witness, may it please the Court, may I suggest that counsel, if he hasn't any further examination, relieve him.

Mr. Lipson: I have further examination of the witness, your Honor.

The Court: On what subject?

Mr. Lipson: I would like to pursue this matter of the [fol. 454-97] trust arrangement, if I may.

The Court: Well, I think we have exhausted that. We are going to require some detailed provisions on that trust arrangement. There ought to be a carefully drafted document to take care of the contingencies that you have been referring to, and perhaps some others, and I think examining this witness about what his ideas are on that subject is premature. I think we ought to draft the document and then, if there is anything ambiguous about it, I think the lawyers ought to work out the ambiguities, not by examining the Chairman of the Board here, a layman, about any ambiguities there may be. I don't think this is a fruitful investigation.

Mr. Lipson: Your Honor, in that regard—

The Court: Is there anything further, any other subject you wanted to discuss with this witness?

Mr. Lipson: Yes, your Honor. I would like to inquire of the witness with respect to the fund known as the Employees Savings Plan of El Paso Natural Gas Company, what will occur with respect to the shares to which that Employees Savings Plan would be entitled in New Company shares.

The Court: That again, it seems to me, is a subject—is or certainly will be—covered in the document in great detail and at length before I approve it. Now, you are asking this man, as well informed as he is—and I doubt [fol. 454-98] if there is anybody any better informed—but I don't think we ought to be asking him to project the terms of a document that the lawyers have not yet drawn.

Mr. Lipson: Your Honor, we are—

The Court: And the document which it is contemplated will be drawn and which, before this thing is over, the Court will insist upon having drawn.

Mr. Lipson: Your Honor, in that regard, perhaps the Government's position is not being made clear. Whatever the provisions of this arrangement are, the Government is opposed to the concept of trusteeing these shares while they are being held for the very persons who are the principal directors of the El Paso and the principal beneficiaries of the stock of El Paso Company.

The Court: It doesn't make any difference to the Government what Mr. Kayser says. You are just opposed to the whole thing.

Mr. Lipson: I think we have a duty to the Court to bring out the reasons why we are opposed to it, or we are missing our function.

The Court: You tell me about those. You can tell me about those if you want to.

Mr. Lipson: Your Honor, I may pursue other areas with Mr. Kayser beyond this.

The Court: No. No. I think there is a time when the [fol. 454-99] witness ought to be relieved.

Mr. Lipson: Do I understand your Honor's ruling is that Mr. Kayser is to take a recess?

The Court: I am suggesting we pursue whatever you have to pursue with another witness. You step down, Mr. Kayser. You can call him back after awhile and discuss whatever else you have.

Mr. Lipson: I don't want to impose a burden on your Honor, but when may I call Mr. Kayser back to continue?

The Court: When we get around to it in the course of these proceedings. Do you have anybody else you want to examine?

Mr. Lipson: Yes, sir. I would like to cross-examine Mr. Howard Boyd.

Mr. Harrison: I have a few questions more of Mr. Howard Boyd, and I am very glad to produce him and complete my questions.

The Court: And you will have an opportunity to cross-examine Mr. Boyd further, if you want.

Mr. Lipson: This afternoon, your Honor?

The Court: I don't know whether we will get to it this afternoon. I have an appointment with the doctor a little later on. I had hoped I would make, but if it doesn't suit your convenience, we will go on this afternoon a little while. Maybe we will get through. Swear the witness. I [fol. 454-100] don't believe Mr. Boyd has been sworn.

Mr. Harrison: Yes, he has. Your Honor, he has testified.

The Court: All right, take the stand.

[fol. 454-101] Howard Boyd called as a witness by the defendants, having been previously duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Harrison:

Q. I call your attention to the San Juan Basin and to the wells facilities of the former Pacific Northwest Pipeline Company and El Paso prior to the stock acquisition.

Will you please describe the conditions then prevailing with reference to the gathering of the gas of the respective companies.

A. Yes. At the time that Pacific Northwest was certificated to move gas out of the San Juan Basin to the Pacific Northwest area, El Paso had an elaborate gathering system in the San Juan Basin. Pacific Northwest had no facilities, of course, of any kind in the San Juan Basin. So, recognizing that there would be tremendous duplication of capital expenditure, all at the expense of the consumer, if Pacific Northwest were required to build a duplicate system, we approached them with the suggestion that it would be in the public interest, in our opinion, if we entered into a gathering arrangement. And the arrangement that we entered into prior to the time that we agreed to buy the stock of Pacific Northwest was limited to a relatively small geographical area. But, more im- [fol. 454-102] portant, the gas that we were going to gather for Pacific Northwest under that arrangement was all in close proximity to the main gathering trunk that Pacific Northwest was to build so that the mileage that we had to carry their gas was necessarily small.

Now, your Honor, I can illustrate this far more graphically—

The Court: Well, you just do what your Counsel asks you to do.

The Witness: Mr. Hunsacker, may I have the map that has been prepared at my request.

(Produced.)

The Witness: If your Honor please, on this map I would like to illustrate with my finger here this rather prominent line. This line to which I am now pointing is the line of Pacific Northwest's main gathering trunk line, and our original agreement with Pacific Northwest, before we agreed to buy their stock, provided that we would gather for them from their wells and move to this trunk only gas within this black line, so that your Honor can

observe that the distance that we had to move the gas was relatively short.

The agreement provided that, in the event that we were asked to gather gas from wells outside of this black line, then we had the right to either reject that or to enter into a new agreement. But, while they were an independent company, the only agreement we had is what I [fol. 454-103] have stated, was to gather within this black area and carry it into this main trunk. Of course, the cost of gathering is necessarily the cost of transportation, so that where the transportation is short, the cost of gathering is reduced.

Moreover, this area here—and it is hard to observe from where your Honor is sitting—is where there is a great concentration of wells, so that, because of the concentration of wells in a small area, the unit cost of gathering the gas was reduced.

That agreement existing between El Paso and Pacific Northwest while it was an independent company also provided that we had to gather gas only from one formation. That was the Mesa Verde formation.

After we contracted to buy the stock of Pacific Northwest and during the period that we held virtually all of the stock—I think 23 had 99.9 per cent of the stock, so, for all practical purposes, it was a wholly-owned subsidiary—we, for all practical purposes, ignored the financial considerations between the two companies, because we were dealing with ourselves. And the agreement then was enlarged to embrace wells that were out here. Each one of these little red dots, your Honor, is a Pacific Northwest well or a well in which they have an interest.

And so, as we continued to deal with our own subsidiary, we obligated ourselves to reach way out here (in- [fol. 454-104] dicating) and to transport the gas back to their main trunk line, the distance of transportation being greatly magnified.

In addition to that, if your Honor please, Pacific Northwest developed formations other than the Mesa Verda.

They developed the Dakota formation, had some wells in the Dakota formation, and that required a separate gathering system.

Let me restate that. The gas from the Dakota and the Mesa Verda is gathered into the same system, but they developed gas in the Picture Cliff formation, which was not the formation from which they had production at the time of the original contract, and when they developed gas in the Picture Cliff, it was necessary to have a different and additional gathering system, because the gas comes in at a different pressure.

Q. Those conditions prevailed until 1960?

A. Yes.

Q. Gradually changing, is that correct?

A. Yes. There is one other observation that I would like to make, and that is that outside of this—well, first of all, inside of the black line, at the time that we entered the contract—and these were the only wells from which we were obligated to buy gas, or gather gas—there were only 126 wells. Today there are approximately 700 wells [fol. 454-105] inside the black line, and outside of the black line where we are proposing, because we consider it to be in the public interest, in order to avoid a duplication of gathering facilities, outside of the black line today, extending way up into this area to which I am now pointing, there are 295 wells.

Q. Well, now, at the time that you entered into those arrangements there was a provision for payment by each company to the other for the gas gathered on behalf of the other, is that correct?

A. That is correct.

Q. What was the contract arrangement in that respect?

A. The contract is in evidence. At least, our proposed new contract has been offered. And the pricing provision there is identical with the pricing provision as it existed in the initial contract, except that, whereas the initial contract provided an initial price of 1.375, but went on to say, however, that it was designed to produce a reasonable cost of service.

Q. Fair cost of service?

A. Fair cost of service. We have now made that calculation to be something in excess of four and a half cents, and so we provided that it be four and a half cents.

Q. After January 1, 1960, when the agreement expired or ended for the lack of two parties, how did you carry this operation on with respect to your accounting?

[fol. 454-106] A. From the period 1/1/60, even up to today, the accounting between the two divisions—because that is all they are today—has been carried on in accordance with a plan of accounting that is on file with the Federal Power Commission, and controls our method of accounting, and it simply bears absolutely no relationship to the contract whatsoever; and, as a matter of fact, the cost that is charged to the Northwest Division under that system of accounts that we maintain in accordance with the plan that is on file with the Federal Power Commission and has been effective since the first of 1960 charges the Northwest Division considerably more than four and a half cents an Mcl.

Q. Have you in the recent past and have you still pending a contract for gathering in that general area with other independent company or companies?

A. Yes. Also operating in the San Juan Basin is Southern Union Gas Company, and we had some wells in the area where they had a gathering system, and we negotiated with them to gather our gas, so as to avoid a duplication of gathering facilities, and, as a result of studies made, both by them and ourselves, and bargaining back and forth, we agreed on a contract arrangement with them that, as both a demand and a—a demand and commodity component, which I think complicates the situation a little bit but does not produce a materially different result, and the price equates out a little in excess of four and [fol. 454-107] a half cents, so that's what we are paying Southern Union to gather our gas.

I might volunteer, if your Honor please, there is nothing terribly complicated about making a calculation of a fair cost of service, and we have disclosed the calculation in our work papers to the distributors in the Northwest area, to the state commissions, and no one of them has said that the calculation of four and a half cents is unreasonably high. All they say is that seven years ago it was 1.375, and they would like to have 1.375 now.

Anybody that is trained in this work can take a look at these exhibits that we have submitted to them and make a calculation of whether or not that is fair and reasonable.

Mr. Sabin: I realize the State of Oregon—

The Court: You have no standing here this afternoon, Counsel.

Mr. Sabin: Very well.

By Mr. Harrison:

Q. Mr. Boyd, some reference was made this morning to a pro forma balance sheet which appears as Exhibit 1, Tab 11, and to a $5,000 loan which appeared there. I wonder if you could refresh your mind from the prospectus of El Paso Natural Gas Company for January, 1957, introduced in evidence by the United States on the main trial, and tell us what that condition was then?

[fol. 454-108] A. Yes. As reflected in the prospectus that was issued at the time we acquired the stock of Pacific Northwest, the bank loans of Pacific Northwest at that time were $38,400,000, as contrasted with the bank loan that we are proposing for New Company of $5,000,000.

Q. Turning, if you will, please, to Tab No.—I believe it is No. 5—relating to certain so-called Kingsgate gas supplies, will you state in that connection, Mr. Boyd, what the origin of the Kingsgate gas supply was?

A. Yes, and I think it might be helpful if I alluded to the map again.

If your Honor please, as originally certificated, Pacific Northwest was expected to acquire gas in the San Juan

Basin, to which I am now pointing, and to move it up this yellow line into the areas of Oregon and Washington.

The cities—the larger communities that they were expected to serve were Spokane, Seattle, and Portland. After the system had been built, large discoveries of gas became available in the Alberta area. First, they already existed in the British Columbia area. As a matter of fact, probably the most hotly contested certificate proceeding that had ever been entertained by the Federal Power Commission up to the time of the issuance of the certificate to Pacific Northwest was between Westcoast Transmission, which proposed to bring a line down out of Canada and to [fol. 454-109] serve the Pacific Northwest area, and Pacific Northwest, which proposed to bring gas out of the San Juan Basin and serve the Pacific Northwest area. After this line had been built, contracts were entered into under which Canadian gas came down through the pipeline of Westcoast Transmission and was delivered to Pacific Northwest at the Canadian border. Subsequently, large discoveries were made in what was recognized to be quite a potential area for gas discovery over in Alberta; and Pacific Northwest, before we acquired the stock, undertook to negotiate for the acquisition of Kingsgate gas—called "Kingsgate" because it enters the United States at this little point on the Canadian border called Kingsgate.

Those negotiations had proceeded to the point where Westcoast Transmission, which was going to be responsible for getting it down to the Canadian border, and Pacific Northwest, which was still a separate corporation, had actually gotten down to the point where they had printed a proposed contract. It was not actually signed until after we acquired the stock of Pacific Northwest; but, recognizing, as did those who were responsible for Pacific Northwest, the high desirability of availing themselves of this Canadian gas, we went ahead and signed the contract. And if you go back and examine what we signed, you will find that there is a short one-page letter of intent

which Mr. Kayser and I signed as the officers of Pacific Northwest, and it was signed on behalf of Westcoast Trans- [fol. 454-110] mission, and we agreed to buy that gas, and we simply provided that the contract that ultimately would be executed would be in the form attached, and the form attached was the printed document that the people theretofore responsible for Pacific Northwest had negotiated out with Westcoast Transmission.

As indicative of the value of that Kingsgate gas, it comes down through a line that had been made possible by virtue of the desire of Pacific Gas and Electric Company to get gas out of Canada and bring it all the way down to San Francisco.

The Court: Repeat that.

The Witness: Yes. This line that I am now pointing to, which is inside of Canada, and this black line which I am now pointing to that comes all the way down to San Francisco was a project sponsored by Pacific Gas and Electric Company. As a matter of fact, Pacific Gas and Electric Company actually owns the line from San Francisco up to the Oregon border. Their subsidiary—I think they own about 50 per cent of the corporation, and it is called Pacific Gas Transmission—owns the line from the Oregon border up to the Canadian border, and the Canadian interests own the line inside of Canada. That project cost over 300 million dollars, and this gas in Alberta was thought by PG&E to be of such value to them way down in San Francisco that they were the principal sponsors [fol. 454-111] of that project; but we, recognizing the value of that same gas, but of much greater value to us because it was expected to be used in this Pacific Northwest area, thereby greatly minimizing the distance that it had to be transported, we negotiated to have 150 million cubic feet transported in these same facilities that transport the gas for PG&E, and the 150 million cubic feet that we are proposing be turned over to New Company comes down through these facilities and is delivered to the Northwest division at three points that I am now pointing to there in the states of Washington and Oregon.

Q. When did that gas, Kingsgate gas, first start to flow from Canada into the Northwest?

A. The Kingsgate gas did not actually start to flow until after the merger took place. Thus it did not start to flow until after 1/1/60.

Q. So that all purchases actually have been made by El Paso?

A. Yes. Not only for the—

Q. I believe you have already testified you expended some three and a half million dollars.

A. Yes. That is the point I want to make right here.

Although Pacific Northwest had negotiated with Westcoast Transmission for the delivery of 150 million cubic feet at this point and had even negotiated it to the point where a printed document had been prepared, still that [fol. 454-112] document, even if executed, was of no value either to Westcoast Transmission or to Pacific Northwest unless Westcoast Transmission, in turn, could successfully negotiate with the producers of gas in Canada. And Westcoast Transmission was experiencing great difficulty in getting the Canadian producers to agree to sell the gas to Westcoast; and, after we entered the picture, we then took over those negotiations with Westcoast Transmission, called on the Canadian producers, and ultimately, only as a result of an outlay of several millions of dollars, were we able to induce the Canadian producers to sign up with Westcoast.

Once that was achieved, then, of course, the contract between Westcoast Transmission and Pacific Northwest became a thing of value, because then gas was available to flow.

Q. Now, in connection with that Kingsgate gas, and turning again to Tab 5 in Exhibit 1, will you explain the origin of that contract and its effect, if it becomes a contract with the New Company.

A. Yes. Although these contracts existed between Westcoast, Pacific Northwest, and the Canadian producers, still, before the gas could actually flow, it was essential that ex-

port permits be obtained from the Canadian authorities and import permits be obtained from the American authorities, Federal Power Commission.

Mr. Kayser handled the presentation to the Canadian [fol. 454-113] authorities but I am acquainted with what took place up there.

The Canadian authorities expressed some misgiving about the issuance of an export permit for fear that Pacific Northwest, which was in financial distress, and because of its then size of markets, would not be able to perform its contracts; and yet, recognizing the value of that Canadian gas, Mr. Kayser indicated that El Paso would stand behind what was then our virtually wholly-owned subsidiary, and that such gas as Pacific Northwest could not consume while its markets were being built up, El Paso would take responsibility for.

Now, then, when we appeared before the Federal Power Commission, the same problem arose as to whether or not Pacific Northwest was going to be able, because its markets had not developed to the point where they have now developed and we expect to develop in the future—the question arose whether or not Pacific Northwest, which was still a separate corporation, but our wholly-owned subsidiary, could absorb as much as 150 million cubic feet or gas per day. So then we proposed, on behalf of our subsidiary again, that if Pacific Northwest could not absorb all of this 150 million cubic feet, then, until its markets did develop to the point where it could digest it, El Paso would take that gas off the hands of Pacific Northwest.

The applications that were filed with the Federal Power [fol. 454-114] Commission even contained some proposed contracts to give effect to what El Paso indicated a willingness to do. Those were only proposed contracts. They were never executed. And, as a matter of fact, before the Federal Power Commission got around to acting on the application, the Pacific Northwest was actually merged into El Paso, and so the necessity of a contract between parent

and subsidiary evaporated, and no contract was ever executed or came into being.

Q. Referring to Tab 5, as I understand it, in essence that provides that over a period of five years at the option of the New Company El Paso will take at the beginning —what is it, 22 billion?

A. Twenty-two billion, not in excess of 22 billion.

Q. Per year?

A. That's right.

Q. Decreasing roughly at the rate of 20 per cent a year and vanishing at the end of five years?

A. That is correct.

Q. But that is all at the option of the New Company?

A. That is right. In other words, if New Company can't find a market for it, they can deliver that quantity to us, and we will buy it.

Q. On the other hand, there is a provision that, if they do deliver any to you—and, by the way, what season of the year are they going to deliver it to you?

[fol. 454-115] A. Obviously, the time when they would unquestionably deliver it to us would be in the summer time, when we don't want it.

Q. And then you return it to them at their option when?

A. Yes. And so that there would be no depletion in their reserves as a result of deliveries that they made to us in the summer time, we have proposed that, at their option again, we will deliver back to them an equal quantity of gas in the season when they might need it, which obviously would be in the winter time when the pipelines, of course, want the gas.

Q. Is that connected in any way with any complaints from distributors or others in the Northwest that Kingsgate supply can't be entirely absorbed at this time?

A. Well, it is our opinion—and except for this we would not have made the proposal—we recognized that in the early ears, for the next two or three years, they probably will want to make some deliveries to us in the summer time. The quantity of gas will be such that they will have difficulty marketing it.

Q. All right. Now—

A. But the growth of their markets has been such that we anticipate that at the end of about five years they are going to have need for all this gas.

Q. How was the price fixed?

A. What we agreed to do was that, as to such gas as they tender to us, which, I say, will be in the summer time [fol. 454-116] when we don't want it, we would pay the Canadian border price, which approximates about 25½ cents. That gas would be delivered to us in the San Juan Basin.

What we have proposed is that the quantity of gas that they ask us to return, which would be in the winter time when pipelines need it, we would deliver to them at 18½ cents.

Q. That 18½ cents is represented by your cost in San Juan plus transportation?

A. No. The 18—well, the 18½ cents is the wellhead price of gas in San Juan Basin plus the four-and-a-half cent gathering charge.

Q. Oh, yes.

A. And we would deliver to them gathered gas.

Q. In each case it is the cost of the gas to the party who is making the transfer.

A. That's right.

Q. Now, may I ask you to state whether, if the proposed plan of divestiture proposed by the company is, in substance, adopted, whether El Paso will any longer have any access to Canadian reserves?

A. No, unless we can negotiate some contract with New Company or PG&E or somebody else.

Q. And what about the Rocky Mountain area?

A. No. We are proposing that there be delivered to New Company, as part of the divestiture, all of the commercial [fol. 454-117] acreage in the Rocky Mountain area.

Q. Would you mind indicating where that is?

A. Yes. This is a somewhat unique system. It is a very long pipeline running, as I say, from San Juan Basin

all the way up to the Canadian border. It is unique in that it gets gas from both ends and from the middle, and the most prolific source of gas in the Rocky Mountain area today is what we call the Big Piney area, to which I am now pointing. But all of this is the Rocky Mountain area in here, and there are sedimentary beds which the geologists use as a basis for forecasting that when the Rocky Mountain area is connected to a large market, thus stimulating exploration, that additional large discoveries of gas will be made in the Rocky Mountain area.

Q. What will be the northernmost extremity of the El Paso system in the event that the company's plan is adopted, or substantially so?

A. We propose to give back everything that we got from Pacific Northwest. Thus El Paso's system will not be north of the San Juan Basin, to which I am now pointing.

Q. Now, some testimony, or some reference, has been made here to the Westcoast Transmission stock which was formerly owned by the Pacific Northwest Pipeline Company, and some reference was made to its purchase and its value and to the gain resulting therefrom. I wonder if you could give us a history of that stock acquisition. [fol. 454-118] A. Yes. When we were negotiating with Pacific Northwest for the purchase of its stock—it was an arm's length transaction going back and forth—trying to determine what the price should be, and as—and one asset that Pacific Northwest then had was a block of Westcoast Transmission stock. This was the stock of their competitor. They then had—this block of stock amounted to about 25 per cent—I think it was exactly 25 per cent—of their competitor, a competitor, which, as I say, had put up the hardest fight that had ever been experienced in a comparative proceeding before the Federal Power Commission up to that time. And, in determining what price we were going to have to pay for the stock of Pacific Northwest, we had to take into account the value of the Westcoast Transmission stock. That was one of the assets that they had. And this reflected in the prospectus that ac-

companied the purchase of Westcoast Transmission stock. And if you refer to Page 7, you will see that the Westcoast Transmission stock is therein set forth, the highs and lows over a given period.

Mr. Lipson: Your Honor, I object to the witness' reading the document that is already in evidence. The document certainly speaks for itself in the matter.

The Court: Sustained.

Mr. Harrison: All right, we will offer the document in evidence.

[fol. 454-119] The Witness: Yes.

A. (Continuing) The price that we took into account was the price at which Westcoast Transmission stock was then selling, which was $29 a share, in that range.

Now, the value of that stock has since depreciated materially. It is now traded in a thin market on the New York Stock Exchange in the range of 14, 15, 16 dollars a share, so it has depreciated in value from 29 down to someplace in the range of 15 on a very thin market.

Q. So that would represent, if you sold it now, a loss of what?

A. Well, we are talking about a million shares, and you are talking about a difference between something in the range of $15 a share and $29 a share.

Q. Or a loss of 14 million dollars?

A. Well, it will actually be greater than that, for the reason, Mr. Harrison, that when we acquired Pacific Northwest and then merged into El Paso, we resorted to what the accountants indicated was the appropriate method of merging those assets under a pooling of assets, and so there went on our books the value of Pacific Northwest stock, not at the $29 which we had paid for it, but rather the price at which Pacific Northwest had paid for it, and that was $5 a share. So that, if we should now sell it for 15, there would be a capital gain of $10 a share, on which we would pay a 25 per cent capital gains tax, so the loss [fol. 454-120] thus would be substantially in excess of the 14 million dollars that you mentioned.

Q. To your knowledge, has the Westcoast Transmission stock ever been useful in the carrying on of the natural gas business other than as an asset in its treasury?

A. Well, it hasn't been of any value there as an asset in the treasury, for the reason that its value has gone down, not up. It has never paid any dividends. We have never had any representation on the board of Westcoast Transmission. We have never sought any. It has been of no value to us one way or the other.

Q. In contrast to the Westcoast Transmission stock that you propose to sell directly and take the proceeds, will you compare that with other assets being transferred to the New Company under this plan with respect to the relative values?

A. In addition to the return to New Company, as we propose, of all of the properties that we got from them, with the exception of this Westcoast Transmission stock which we propose to sell, we propose to return all of the additions and improvements that we put on that system during the period that it was under our stewardship. And those improvements and additions are indicated by these orange lines that appear here on the map. It is not possible to show all of those that are here in the San Juan Basin. Space on the map just does not permit it. But in [fol. 454-121] dollar amount the additions to the system put on there during the period of the merger, that is, from 1/1/60 up until today, in round figures amount to $59,500,000.

Q. Are you including in that the three million or three million and a half dollars extended for Kingsgate gas in Canada?

A. No, I am not.

Q. Now, in addition to the facilities and additions and extensions you have mentioned, the plan, I believe, calls for certain gas supplies and reserves which Pacific Northwest did not own. Will you state what they are? A. You mean—well, they did not own the Kingsgate gas. At least,

we negotiated that in the fashion that I have just described. Moreover, during the period of the merger we negotiated in the name of El Paso, because Pacific Northwest was no longer an existing corporation. We negotiated contracts in the Rocky Mountain area, and we propose to return to New Company not only the reserves in the Rocky Mountain area that Pacific Northwest had, but, in addition thereto, all the reserves that were negotiated during the period of the merger by El Paso.

Q. And also, of course, the reserves of Pacific Northwest itself in the San Juan Basin?

A. And all of the reserves of Pacific Northwest in the [fol. 454-122] San Juan Basin.

Q. Now, there has been some suggestion made here, or in some of the memoranda filed here, that you should give more gas, and particularly should give it from the San Juan Basin. I would like to ask you whether additional supplies in the San Juan Basin are useful to the Pacific Northwest market at this time, particularly in view of the Kingsgate supply?

A. There are several answers to that. First of all, the managers of Pacific Northwest, even before we took it over, recognized the value of Kingsgate gas and undertook to negotiate for it in the fashion that I have described.

I think it is not inappropriate, your Honor, to talk somewhat about the economics of the gas business. It is not in the interest of a pipeline company simply to go out and contract for all of the gas that it can possibly contract for. It is appropriate to look upon your gas under contract as the inventory that you rely upon for meeting your market requirements, and it is expensive to have too large an inventory.

The Federal Power Commission has addressed itself to this subject from time to time, and in some years—

Mr. Lipson: Your Honor, I object to this testimony, because it is completely repetitive of the exact testimony Mr. Boyd gave before this Court at the hearing of October 19.

The Court: Well, let's not repeat what we have already [fol. 454-123] had.

Mr. Harrison: I didn't think it was. I certainly wouldn't ask it if I did. However, I think Mr. Boyd can probably complete it very quickly. We are about through, as a matter of fact.

The Court: Go ahead. I don't remember whether it was given before.

A. (Continuing) Anyhow, the Federal Power Commission—I will be as brief as I can—the Federal Power Commission in years past indicated that a so-called 12-year deliverability life was a standard that should be observed. Since then there have been indications that that should be reduced somewhat, and there has been a very recent decision by an examiner, very elaborate decision by the examiner, in the so-called Permian Basin area rate proceeding where he addresses himself to this specific point and indicates that a 12-year deliverability life is costly to the customers and perhaps more than is desirable.

Q. How would this supply here, if it is in excess, be used in the Northwest?

A. As shown by the exhibits in the plan, the New Company will have a 14-year deliverability life. Equally significant, the examiner in the area rate proceeding which I have mentioned found that the ideal life index would be 17½ years, and he recommends that the present national average of approximately 20 years be scaled down between [fol. 454-124] now and 1970 to 17½ years.

Now, to contrast that with the life index that New Company will have, New Company will have a life index of 27.4 years.

Your question, Mr. Harrison, was: What is the value of San Juan gas to New Company? What I was trying to point out was that they had already decided to take Kingsgate gas and, even at the time of the proposed divestiture, we recognized that they are going to have difficulty digesting all of the Kingsgate gas. That is the reason we pro-

posed this stepped down contract, continuing over a period of five years, that will help them digest in that period gas that exceeds their present requirements. If they were to acquire additional San Juan gas, they would have to pay for it. This isn't like buying a pair of shoes or contracting for something to be delivered in the future, that is going to be manufactured in the future. When you have a 14-year deliverability life and you go out to a producer and say, "I want to contract to purchase your gas," the first question he asks is: "When are you going to start to take and pay for it?"

And if you say, "I already have a 14-year supply, and I won't take your gas until the 15th year," you get this answer: "Well, go talk to somebody else or you start paying now for the gas that you are going to take 15 years from now."

And that is the reason the examiner in this area rate [fol. 454-125] proceeding that I mention has pointed out that to have too large an inventory—

Mr. Lipson: Your Honor, I object to this constant reference to an examiner's decision, which is a matter of public record. Surely, if it is relevant, it can be put in evidence.

The Court: Yes.

The Witness: It expresses my concept, your Honor, of the economics of the gas—

The Court: Why don't you express your concept of it without reference to it?

The Witness: I will.

A. (Continuing) It illustrates the unnecessary investment of capital beyond the exigencies of the business; and, when that money is expended, obviously the customer has to pay for it.

Now, let's address ourselves specifically to gas in the San Juan Basin. Every bit of market expansion of Pacific Northwest, I think without a single exception during the entire period of its existence, has been exclusively in the Pacific Northwest and Rocky Mountain area.

The only deliveries, I think, of any consequence, if not all the deliveries whatsoever, south of this point to which I am now pointing are made to Colorado Interstate and to Mountain Fuel Supply.

[fol. 454-126] Colorado Interstate has indicated that it would like to be relieved of its contract. Not only does it not want more gas, it doesn't want the gas that is being delivered to it.

Mountain Fuel has indicated that they have their own exploration program, and they are not desirous of buying any additional gas. Thus all of the expansion has been in the Pacific Northwest area near to the Canadian border; thus Canadian gas can be delivered to the area of the market expansion with a minimum of transportation costs. And, after all, the cost of gas to the distributor is not the cost of gas; it is, for the most part, the cost of transportation.

Thus, if additional San Juan gas were to be acquired, it would have to be transported from the southern extremity of the Pacific Northwest line up to the northern extremity of the line. Today, and for a couple of years, the market requirements in the Pacific Northwest have been such that in the winter time every cubic foot of natural gas that can be stuffed through this bottleneck here is pushed through. Not one cubic foot more of gas can be pushed through there in the winter time. Thus, if the market expansion in the Pacific Northwest area is to be met by gas from the southern extremity of the system, it will be necessary to loop long sections of a small diameter portion of the pipe in here. Even to put through 150 million additional cubic feet of gas through that line you will have to loop 330 [fol. 454-127] miles of main line trunk at a cost in excess of 49 million dollars; so it seems to us that, since all of the market expansion has been in the Pacific Northwest area, the place where this company should seek its additional gas supply is from Canada and the Rocky Mountain area.

Mr. Harrison: That is all.

The Court: We will recess until tomorrow morning at ten o'clock.

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[fol. 454-128]

TRANSCRIPT OF PROCEEDINGS—December 3, 1964

HOWARD BOYD resumed the stand and testified further as follows:

Direct examination (contd.).

By Mr. Harrison:

Q. Mr. Boyd, the request has been made for certain information concerning the ownership of shares of El Paso Natural Gas Company by stockholders in groups of 100 each. You have that document in your hand, and will you explain it?

A. Yes, I do. At my request the transfer agent prepared this information for us. I think we have already given—I will start from the beginning and give it over again. From zero shares to 99 there are 59,321 shareholders holding 1,942,501 shares; holding exactly 100 shares there are 26,374 shareholders holding 2,637,400.

Mr. Lipson: Your Honor, we would have no objection to the document's going in evidence.

The Witness: Very well.

The Court: I want to hear it if you don't mind, Counsel.

A. (Continuing) With respect to shares in the number of 101 to 200, there are 17, 754 shareholders holding 2,901,864 shares. In the group of shares 201 to 300 there are 5,834 shareholders holding 1,566,048 shares. With regard to shares in the amount of 301 to 400 there are 2,534 [fol. 454-129] shareholders holding 933,373 shares. In the group 401 shares to 500 shares there are 1,710 shareholders holding 825,411 shares. In the group 501 to 600 shares there are 719 shareholders holding 408,004 shares. In the

group 601 to 700 shares there are 538 shareholders holding 356,599 shares. In the group 701 to 800 shares there are 395 shareholders holding 304,099 shares. In the group 801 to 900 shares there are 215 shareholders holding 186,987 shares. In the group 901 to 1,000 shares there are 481 shareholders holding 476,308 shares. Thus, holding 1,000 shares or less, there are 115,875 shareholders holding 12,538,594 shares.

Then, holding—in the group holding more than 1,001 shares there are 1,625 shareholders holding 10,394,775 shares.

Q. Will you read the last number again.

A. The last number, that is, the group involving 1,001 shares and more, there are in that group 1,625 shareholders holding 10,399,775 shares.

Q. Mr. Boyd, also, inquiry has been made concerning the stock ownership of the officers and directors of El Paso Natural Gas Company. Do you have in your hand a document entitled, "El Paso Natural Gas Company Common Stock Ownership, Officers and Directors"?

A. Yes, I do, and I would like to explain where this came from. This came from our annual report to the Federal Power Commission reporting on the year 1963. It was filed [fol. 454-130] in early 1964 and there have been—there has been at least one notable change and that is that Mr. Liddell, who was general counsel and director, is now deceased. There may have been some inconsequential changing in the shareholdings since that period, but I have reason to believe that there has been no material change, and what that shows with respect to the holdings of all officers and directors, going down to assistant secretary and assistant treasurers, that group holds 568,507 shares, and we have done the arithmetic to show what percentage of the total holdings that amounts to, and that amounts to a holding of 2.48 per cent. In addition to that, as of a current date—and I mention "current" simply in contract to the information applicable to the officers and directors in the Employees Savings Trust and the Employees Retire-

ment Trust—there is an aggregate of 823,303—no—yes, that is correct.

Q. No, the total officers and directors—

A. Wait a minute. Yes, you would have to add those two figures together. In the Employees Savings Trust there are 239,462 shares, and in the Employees Retirement Trust there are 15,334 shares. When you add the Employees Savings Trust, the Employees Retirement Trust, and the holdings of all officers and directors, you get an aggregate of 823,303 shares. Percentagewise that amounts to 3.59 per cent.

Mr. Harrison: Does the Court care to have the individual [fol. 454-131] holders read or maybe just offered in evidence.

The Court: I have no interest in it.

OFFER IN EVIDENCE

Mr. Harrison: We offer it.

The Court: It is received.

(Defendant's Exhibit "H" was thereupon marked for identification and received in evidence.)

By Mr. Harrison:

Q. Mr. Boyd, some reference was made in the course of testimony to the incidence of a capital gains tax on the issuance of rights to subscribe by stockholders. Will you explain why, although that might involve the payment of a capital gains tax, it might be to the business advantage of El Paso to do so?

A. First of all, let me say that on the spin off there is no capital gains tax involved. If we distribute the stock of New Company to the stockholders of El Paso Natural Gas Company under a rights offering, they get the full monetary value of whatever that stock may be. Having in mind that, although this company, in our opinion, is going to be extremely well capitalized, excellent earnings, and

therefore very attractive, it will be a company that has no past history of earnings and therefore the evaluation of the stock may be a matter of some less certainty than with respect to a corporation with a long history of earnings. Therefore, if we go distribute this stock to our own stockholders, they get the full value of the stock of New Company, whatever it may be.

[fol. 454-132] Now, when we do that, we do incur—that is, if we offer this stock to our own stockholders under a rights offering, we do incur a capital gains tax. We estimated that that tax would amount to about 24 million dollars. Obviously we would like to avoid that tax to the extent that we can do so.

Q. It would be a correspondingly lower tax if it was only partially issued on rights to subscribe?

A. I believe that is true.

Q. Now, would you please state what your present relationship is to security holders with reference to percentage approval of the plan of divestiture which you have submitted to them.

A. We have—in dollar amount we have approached and secured the consent from our bond holders and debenture holders of more than 98 per cent. There is a group of very small holders, widely scattered geographically, which we just haven't had time to approach, but the 98 per cent consent is sufficient under the terms of our indenture of mortgage and debenture indenture to consummate the plan in the fashion that we have proposed.

Q. Now, have you from time to time since the last hearing in this court discussed the plan of divestiture with representatives of the Department of Justice?

A. Yes, I think that since October 19 my calculations indicate we have had four conferences with the Department.

[fol. 454-133] Q. And was the subject of a form of decree of divestiture part of the subject matter that was discussed?

A. Yes, it was.

Q. And you discussed all of the various provisions along the line of those set forth in Exhibit "C"?

A. Yes, that is correct.

Q. Did you discuss also the selection of a chief executive officer for the New Company?

A. We did.

Q. Did you arrive at tentative agreement on that?

A. I wouldn't say it was an agreement. They had asked us to nominate a man. We had looked for a man. We found a man that we thought was eminently qualified. We supplied the Department of Justice with a dossier with respect to this man, and within 24 hours we got the report back that he would be acceptable as the chief executive officer of the New Company.

Mr. Harrison: No further questions.

Mr. Lipson: May I confer with counsel for a moment, your Honor.

In order to clarify the record, to avoid confusion, I understand that the document entitled, "Analysis of Stock Listed, El Paso Natural Gas Company, Record Date—November 16, 1964" has been offered and received in evidence.

Mr. Harrison: Yes.

[fol. 454-134] Mr. Lipson: Your Honor, with the Court's permission, I would like to proceed now to cross-examine Mr. Boyd and defer cross-examination of Mr. Kayser to some future time.

The Court: Proceed.

Cross examination.

By Mr. Lipson:

Q. Mr. Boyd, may I direct your attention to the trust plan that is incorporated as part of your divestiture decree, although it doesn't appear in the Defendants' Exhibit "A" itself. Are you familiar with the plan I am referring to?

A. Yes, I am.

Q. Now, with respect to that plan, do you contemplate that the trustee will sell all shares by the end of a ten-year period?

A. No. As Mr. Williams himself inquired: Would we be willing to divide the persons that would be affected by that provision between officers and directors on the one hand and what we have characterized as large stockholders on the other hand? A large stockholder is defined to be one who has as much as one-half of one per cent, and what we had proposed in the language that is contained here is that, with respect to officers and directors, if their ineligibility had not been removed within a period of ten years, then the trustee was to sell the stock of New Company that would have been held on their behalf.

[fol. 454-135] With respect to the other group, that is the so-called large stockholders, their shares would be held by the trustee so long as their ineligibility existed.

Q. That is for so long a period as they continued to one one-half of one per cent or more of the El Paso common shares?

A. That is correct.

Q. I would like to get back to that in a moment, but first I would like to clear up something else. In disposing of the shares under that block of the trust represented by management and officer shares, would the trustee have any restrictions as to whom he could sell or transfer these New Company shares?

A. Well, obviously he could not transfer to other officers and directors—well, as a matter of fact, the trustee has no function during the ten-year period except to vote the stock in accordance with the direction that he receives from the management of New Company; and in that connection I would like to say that we suggested to you that the voting could be in accordance with the Attorney General of the United States and you said, no, you didn't want to assume that responsibility, and we said, "Well, we are willing to give the Attorney General a veto power."

And you said, no, you didn't want that responsibility.

We said, "We have no concern with the identity of the trustee. We have no desire whatsoever to in any way [fol. 454-136] influence the vote of the stock that is held by the trustee.

Q. Now, with respect to restrictions on the ability of the trustee to dispose of these shares at the end of the ten year period, if there are any management shares left in the fund, he is obligated under your plan, is he not, to sell or exchange them?

A. Well, to sell them.

Q. To sell them.

A. To sell of them or dispose of them to charity or in such fashion as the officers and directors direct them to dispose of them.

Q. Would there be any restriction on his ability to sell those shares to persons who are already shareholders in El Paso?

A. We haven't given any consideration to that. It is a matter of little consequence to us. We just haven't given it any consideration. You may recall, Mr. Lipson, that in the discussions that we had with you—and I thought you were in agreement with us—that it was inappropriate to incorporate in the decree itself the elaborate provisions of the trust agreement, and that was to be drafted as a separate instrument. And we said we were sure that we would have no difficulty satisfying you with the terms of the trust instrument.

Q. You refer to the conversations you have had with the Department of Justice, Mr. Boyd, merely with respect to [fol. 454-137] the observation that it was not your understanding, was it, that we reached any final agreement as to the position to be taken on the El Paso divestiture plan?

A. I have not so testified. When we last met with you about—I will give you the exact date. That was on Wednesday, November 18. We had finalized the language which you people—that is, the group we were then discussing the

matter with said that you would take it up with Mr. Orrick. We next heard from you through our counsel on the afternoon of Friday, November 27, just last Friday, that the plan was not acceptable.

Q. Now, I would like to direct your attention to that other half of the trust represented by the large stockholder shares. I guess it is 115,000 shares or more.

A. Well, it is anything involving one-half of one per cent or more.

Q. Are you familiar with the fund known as the Employees Savings Plan of El Paso Natural Gas Company?

A. Yes, I am.

Q. That is a savings plan that was set up by El Paso, was it not?

A. For the benefit of its employees, yes.

Q. That's right. And it has something like 210,433 shares of El Paso common stock in that fund?

A. The savings fund?

Q. Yes, sir.

[fol. 454-138] A. Well, I just read the current figure. See, that grows from month to month. The current figure, Mr. Lipson, is 239,462 shares.

Q. I understand it that these funds are held in the name of Weber and Company, who are nominees for First National City Bank, is that correct?

A. I don't know. There is a corporate trustee that holds the funds and what may be the practice of that corporate trustee with respect to the selection of a nominee I just don't know. I wouldn't question that. I do know that it is the common practice of these big financial institutions to hold their trust funds in the names of nominees. Now, what is the nominee of First National City I don't know.

Q. But it is First National City who is the trustee?

A. I was not even sure of that, Mr. Lipson. There are several of these large financial institutions that act as trustees in different matters, transfer agents and registrars. I don't question that the First National City is the trustee of the savings plan.

Q. With respect to the voting rights of these 239,462 shares, who currently votes then?

A. I think they have only been voted once, but I could be wrong about that. Now, these, of course, you bear in mind, are El Paso shares.

Q. Yes, sir.

[fol. 454-139] A. Then one time that we voted them it was management of El Paso Natural Gas Company that voted the shares.

Q. This fund was set up in January 1, 1961, was it not? Is that your recollection?

A. I would say it was about that time.

Q. Now, with respect to the number of shares that the fund that we are referring to would get in New Company, would they get a proportionate number of shares in New Company?

A. Yes, they would get a percentage that was equal to—roughly equal to—239,000 over 23 million.

Q. Who would vote these New Company shares?

A. That we propose that they go into the trust and would be voted by the management of New Company.

Q. After the ten-year period has expired with respect to the management block of this trust, do I understand correctly that the trust would nevertheless continue with respect to the shares held by the Savings Fund—held on behalf of the Savings Fund?

A. I think your question said "with respect to the officers and employees." Maybe you had better reframe it or let me have the question again, please.

Q. I will be glad to. After the ten-year period has elapsed, the management shares in the trust would cease to exist as part of the trust arrangement?

A. That is right. If they haven't been theretofore sold [fol. 454-140] and the ineligibility, or the ineligibility otherwise, removed, then the trustee would be expected to sell them.

Q. But the large shareholder block of the trust, the other half of the trust, that would continue after the ten-year period?

A. That would continue unless the ineligibility had otherwise been removed.

Q. That is, unless the account or the person sold enough shares to bring them below the one-half of one per cent figure?

A. That is right.

Q. Is there a terminal date on the Savings Plan of the El Paso Natural Gas Fund?

A. No. This is a fund that is set up for the benefit of the employees, and we are hopeful that we can continue it so long as we are in business.

Q. Well, then, the trust arrangement with respect to these shares at least would continue in perpetuity?

A. Well, I might say that that is what we suggested, but, on the other hand, let me point out that there are no tax consequences to the sales and purchases made by these funds. They have been qualified by the Internal Revenue Service, and therefore the same tax disadvantage does not stem from the sale by these funds of the stock of New Company and, if his Honor had any feeling that the shares of [fol. 454-141] New Company which otherwise would go to the trustee by virtue of the holdings of these two funds, we have absolutely no objection to a provision providing for the sale of those shares within some reasonable time. [fol. 454-142] Q. But there's no present provision of that nature in the plan that you've outlined?

A. No. But as I mentioned earlier, we expected the trust agreement to be a separate document, and that could very easily be provided for.

Q. I'd like to direct your attention to another fund known as the retirement fund. You called it on your Exhibit I the employees' retirement fund.

A. Yes.

Q. Are you familiar with that fund?

A. Yes.

Q. And that's a fund of a similar nature, is it not, held by a corporate trustee?

A. Well, it's similar in the sense that it's designed to provide retirement funds to the employees, which is another fringe benefit for the employees.

Q. Are you familiar with the nature of the corporate trustee?

A. I was under the impression that that was Chase.

Q. Chase Manhattan Bank?

A. Yes, Chase Manhattan Bank.

Q. Who votes the El Paso shares held by Chase under that retirement fund?

A. Well, I must confess I don't know. There are only 15,000 shares in there, and I don't even know when those shares were acquired. Therefore, I'm not sure that they [fol. 454-143] have ever been voted. But we feel that we have—that is, we feel that management has the right to vote.

Q. Now, under the El Paso divestiture plan will you explain what would happen to the New Company shares that the retirement fund would be entitled to receive?

A. Everything that I said with respect to the savings fund would be applicable to the retirement fund.

Q. I would like to direct your attention to Government Exhibit No. 1 that was introduced yesterday. I direct your attention to the entry under the name, "Fish." There are two entries there, one Mrs. Bessie N. Fish and Ray C. Fish, care of the Bank of the Southwest. Now, with respect to the Ray C. Fish account, there are, according to the exhibit, 153,293 shares of El Paso common stock in that account.

A. That's what this indicates, yes.

Q. As of the date of this exhibit?

A. Yes.

Q. For the record, Ray C. Fish is deceased at this time, is he not?

A. That is correct.

Q. And this represents his estate?

A. That's my understanding. Part of the estate.

Q. Part of the estate. Now, the block of New Company shares to which the estate of Ray C. Fish would be entitled would, if I understand your description of the trust cor-
[fol. 454-144] rectly, fall into the large Shareholder half of the trust?

A. Yes, sir. But before I answer that question, I think one of your prior questions may have been misleading. This does not indicate that the Bank of the Southwest is the trustee of both Mrs. Bessie N. Fish and Ray C. Fish. Mrs. Bess N. Fish, according to this, holds the shares in her own name. And I think it's appropriate for the purposes of the record to state that she is the divorced wife of Ray C. Fish. So I'm not aware of any community of interest there whatsoever.

Q. I'm very glad that you pointed it out, because it was not my intention to make any such thing appear on the record.

A. Yes. With respect to your last question about what disposition would be made of the shares of New Company stock which would otherwise go to the bank of the Southwest as trustee for Ray C. Fish, since that would fall in the category of one-half of one per cent or more, what we have proposed is that those shares of New Company stock would go to the trustees to be voted by the trustee in accordance with the directions received from the board of directors of New Company.

Q. Now, for how long a period of time would those New Company shares remain in the trust?

A. You'd have to ask the trustee that. If the trustee saw fit to sell them, why, they would be sold.

Q. There is some confusion on the record on the point, because I believe there was a statement made in describing [fol. 454-145] the nature of the trust yesterday; and if it's wrong, I wish you would correct me. The trustee would have no discretion to sell except—

A. You're talking about two different trustees. You're talking about two different trustees.

Q. With respect to the trustee that is the Ray C. Fish Bank of the Southwest trustee, could you refer to it as Bank of the Southwest, so that there won't be any confusion?

A. Yes. Now, your question was how long would the trust established for the purpose of holding the shares of New Company persist with respect to the shares that represent a part of the estate of Mr. Fish. My answer to that is that they would be held until the trustees of the estate, namely, the Bank of Southwest, or such other person as the Court might designate, decided to—by the Court, I'm talking about the Probate Court—might direct that the shares be sold in liquidation or satisfaction, winding up the estate.

Q. Well, the estate may not be wound up for many years?

A. I can't answer that. I don't know what the probate practices are in Texas.

Q. But you have no terminal date to that half of the trust, do you?

A. That is correct.

Q. And it could last for fifty years?

A. Yes.

[fol. 454-146] The Court: Well, the Probate Court would be delinquent if it did. I don't think you could make any such assumption.

Mr. Lipson: I think that the point that is made with respect to the Ray C. Fish block would apply equally well to a block of similar size that would be owned by a non-estate. It could last well beyond. The point I'd like to make is that it could last well beyond the ten-year-period.

The Court: Make any point you want to; but you weren't making a point. You were assuming the Ray C. Fish estate would remain enclosed in the Probate Court for fifty years, and I think that's an unwarranted assumption. Anyway, it's an assumption. We're not interested in assumptions.

By Mr. Lipson:

Q. Mr. Boyd, have you ever met Mr. Kenneth S. Adams, Jr.?

A. To my knowledge I have not. I express it that way because there was a time when I lived in Houston, and I notice from this that he lives in Houston. So I wouldn't say positively I've never met him, but if I have, I'm not aware of it.

Q. His shares would also follow the same pattern that we described before with respect to the Ray C. Fish share?

A. He would fall in the category of large stockholders. I say "large" because that's defined to be anyone owning as much as one-half of one per cent of the stock. Therefore, his shares would go into the trust.

[fol. 454-147] Q. Is Mrs. Bess N. Fish still alive?

A. I understand that she is.

Q. With respect to the half of the trust holding the New Company shares that are represented by the management of El Paso—the word "represented" is misplaced there—that are beneficially owned by the management of El Paso, would you describe what would happen to those New Company shares if the officers or directors of El Paso retired in the ten-year interim?

A. What we proposed was that if their ineligibility ceases—in other words, if they cease to be an officer or director—then what we propose was that since the ineligibility is removed that they be entitled to take possession of the stock of New Company.

Q. Will you describe what would happen when you have both situations existing? That is to say, if I may use Mr. Kayser as an example, he owns more than one-half of one per cent, and also is an officer-director of El Paso. If he retires as an officer or director of El Paso in the ten-year interim, would he then be entitled personally to the New Company shares?

A. No, sir. He would still be ineligible by virtue of the fact that he owns more than one-half of one per cent, and,

therefore, he would not be entitled to vote the stock of New Company.

[fol. 454-148] Q. And his shares would enter into the other half of your trust arrangement?

A. Well, they'd be in the trust, and they'd simply stay in the trust.

Q. Now, with respect to the ineligibility of those large shareholder accounts in the trust, if the shareholdings are reduced to one share below that represented by one-half of one per cent, would that represent a removal of the ineligibility of that score?

A. That's what we proposed. We felt there ought to be some reasonable breakoff point, and we thought that when you got down to the point where you were talking about a fellow who had something less than one-half of one per cent that it was not unreasonable then to let him take possession of the stock of New Company, assuming that he wasn't otherwise disqualified by virtue of the fact that he was an officer or director. Of course, if he's an officer or director of El Paso, he's totally disqualified from ever voting a share of New Company stock or even holding such a share in his possession.

Q. So long as he remains an officer or director?

A. That's right, so long as he remains in that ineligible category.

Q. Now, apart from those shares that we've been discussing that would be placed in this trust arrangement, are there any other additional restrictions incorporated [fol. 454-149] in the El Paso plan that would prevent an El Paso shareholder from voting New Company stock?

A. That would prevent an El Paso shareholder? In other words, you mean if somebody in the group of 160,000 El Paso stockholders should acquire a share of New Company stock, would he be entitled to vote it? We haven't proposed any restriction on that.

Q. Are there any other restrictions than the trust restrictions that we've been speaking of?

A. Yes. There are. The trust—

Mr. Harrison: I would suggest at this point that the witness be given the document about which he's testifying.

By Mr. Lipson:

Q. Do you have a copy of the—

A. Yes, I have a copy of it.

Q. Of the decree?

A. The trust deals with the shares of New Company stock which otherwise would be paid to an El Paso stockholder under the company's proposed distribution of the stock of New Company. But if you will look at VI, subdivision C, there is a provision that we may not have in our employ an officer or director who holds so much as one share of the stock of New Company.

Q. Let me rephrase my question, Mr. Boyd. According to Defendant's Exhibit I—do you have a copy of that before you, the El Paso Natural Gas Company common stock ownership list?

A. Yes. Yes. I have it.

[fol. 454-150] Q. At the very bottom of that document there are two percentage figures, one representing the per cent shares held by officers and directors to the total number of shares outstanding in El Paso, and the figure there is 2.48 per cent?

A. That's right.

Q. And the other figure is the per cent shares held by officers, directors, and employees' savings and retirement trusts, to the total shares outstanding of 3.59 per cent.

A. Yes, sir.

Q. Would the total of these two figures be approximately the percentage number of shares that would fall in the trust arrangement that you spoke of?

A. First of all, it wouldn't be the—well, the answer to that is no.

Q. Can you estimate the total percentage of the outstanding El Paso shares that would be included in the trust arrangement you've been referring to?

A. Well, all of the facts are in evidence from which the mathematical calculation can be made. If you want me simply to express an impression—

The Court: No. No.

A. Well, the calculation can be made, your Honor.

By Mr. Lipson:

Q. With respect to the remaining shares of New Company stock above the percentage we were referring to, would there be any restrictions on the ability of El Paso [fol. 454-151] shareholders to vote those New Company shares?

A. You've lost me someplace. May I undertake to restate what you're inquiring about, to make sure I understand?

Q. I'd be pleased if you would.

A. Yes. We're dealing here with the distribution of the shares of New Company stock, and we have provided that certain people are ineligible to receive those shares and to vote them. And we have proposed to the Court that there be established a trustee with an appropriate right in the trustee. However, we don't care how the trustee is directed to vote those. Now, are you inquiring whether shares not in that trustee otherwise would go to El Paso stockholders—for example, Mr. Evans here on this list has eight shares of El Paso stock, and therefore he would receive some almost infinitesimal percentage of stock of New Company. Well now, I can't even use that as an example, because he couldn't even get the stock of New Company.

Q. If you refer to Government's Exhibit 1, you may find an example.

A. There's a stockholder of El Paso who has a hundred shares of El Paso stock. He's not an officer and director, and he will get a very small percentage of the stock of New Company. And you're asking whether or not his right to vote it is in any way restricted?

Q. That is correct.

[fol. 454-152] A. We have not proposed any such restriction.

Q. And unless he were an officer or director, there would be no restrictions at all on this individual if he owned one share less than that represented by one-half of one per cent of the total outstanding El Paso shares?

A. That's right. That's what we proposed.

Q. Mr. Boyd, have you had any occasion to determine the amount in dollars that El Paso expects to receive from the sale of rights to purchase the New Company shares?

A. Well, El Paso doesn't receive anything in the sale of the rights.

Q. Would it receive anything in the sale of the New Company shares, assuming an exercise of the rights?

Mr. Harrison: Repeat that. I didn't understand the question.

(Question read.)

A. Yes. We have assumed that El Paso would receive from an exercise of the rights—and don't hold me to the exact figure, but it's in the plan that we have submitted—it's in the magnitude of $107 to $108 million, on which we have to pay a capital gains tax, if we went that course, of approximately $24.5 million.

By Mr. Lipson:

Q. Leaving a balance of approximately $75 million? I'm sorry. I'm understating it. Approximately $80 million.

[fol. 454-153] A. I thought it was $79 million.

Mr. Harrison: I suggest we compute it later.

By Mr. Lipson:

Q. With respect to the after-tax proceeds, this $79 million, how will these proceeds be divided between El Paso and New Company?

A. They won't be divided at all. In other words, El Paso Natural Gas Company paid for the assets of Pacific Northwest. Now, we're required to divest them. When we sell them, we expect, of course, to retain the results of that sale.

Q. Do you have a copy of the divestiture plan itself before you, Mr. Boyd?

A. Yes.

Q. Would you refer to the balance sheet of that plan? Does that indicate the capitalization of the New Company, the manner in which it is capitalized between stock and debt?

A. Yes, that is correct.

Q. What is the capitalization of stock in dollars?

A. Well, it will have a—it will have a book value of $63,200,742.

Q. Yet you've just said that you would receive after tax $79 million for sale of the company's stock. What would happen to the balance, the roughly $19 million balance?

A. Mr. Lipson, when we bought Pacific Northwest, like most stock purchases, you don't buy on the basis of book value. You buy on the basis of market value. And thus, [fol. 454-154] when we sell, we sell not on the basis of book value, but we sell on the basis of market value.

Q. Well then, from what you state, the capital stock of New Company, although it is listed at roughly $63 million, has a market value, you anticipate, of roughly $79 million?

Mr. Harrison: No. I submit that that's not the answer of the witness, the statement in the record.

A. I said it had a market value of approximately $108 million.

By Mr. Lipson:

Q. It has a value to El Paso after taxes of $79 million?

A. Market—

Q. I don't want to overstate the amount.

A. I think I've testified to it, Mr. Lipson.

Q. As part of your divestiture plan, have you determined how El Paso proposes to apply the proceeds of this sale?

A. It would be applied in the—

Mr. Harrison: Your Honor please, I submit that the sale is a long ways off.

The Court: You're not going to establish the proceeds until you sell it.

The Witness: Yes. And, if your Honor please, we hope that the business situation will be such that we can by some method avoid the payment of this tax. And the tax only arises in the event that we do sell it. And we would hope to avoid such a sale, if the business situation permits [fol. 454-155] us to do so.

By Mr. Lipson:

Q. Have you considered applying these proceeds to reduce the El Paso debt?

A. We haven't reflected on it in that regard. It would be used in El Paso operations. I'll put it that way.

Q. I'd like to direct your attention, Mr. Boyd, to the matter of management of the New Company for a moment. With respect to the questions that I propound to you in this regard, it is not my intention to have you disclose the name of any individuals. I'd just like to preface my questions with that remark.

A. Yes. Of course, we have disclosed the identity of the man that I referred to.

Q. El Paso has the—

The Court: I don't understand what you're talking about. Disclosed what man?

Mr. Lipson: I don't want to embarrass any individuals if it's not necessary to do so.

The Court: I don't know why we're worrying about embarrassing anybody.

The Witness: If your Honor please, during the course of our negotiations with the Department of Justice, we provided of course that there would have to be good management for this New Company.

The Court: You suggested a manager?

The Witness: Well, they asked us to suggest a manager. [fol. 454-156] The Court: I understand. And they approved it?

The Witness: And they approved it.

The Court: All right.

By Mr. Lipson:

Q. The approval was a negative approval in the sense that no objections were made? Is that your understanding?

A. You'll have to testify in your own mental processes, Mr. Lipson.

Q. May I ask you whether I personally approved the manager?

The Court: Beg pardon? I didn't hear that.

By Mr. Lipson:

Q. May I ask that the question be stricken, sir? I'd like to withdraw it. Have you come to any informal agreements or understandings with this individual?

A. Well, we've had discussions with him after we talked to you about it. And when I say you, I'm talking about the government, although I think, Mr. Lipson, you have been present in all of the conferences that we've had. Obviously, after we mentioned his name and gave you a brief dossier, we then contacted him to see whether or not he was available to undertake the assignment. And he indicated that he would be.

Q. Have you entered into any kind of informal arrangement with this gentleman with respect to the nature of his employment?

A. What we suggested to him was that he was expected to be the chief executive officer of New Company.

[fol. 454-157] Q. Was there any—

A. Assuming, of course—bear in mind we pointed out to him and to you that it has to be with the approval of court, of course.

Q. Was there any discussion of the amount of time that a contract of employment would cover?

A. We've indicated that that was a matter between him and New Company.

Q. Are there any written materials with respect to this arrangement?

A. No, sir.

Q. Under the El Paso divestiture plan how will the New Company's board of directors initially be selected?

A. Well, what we had proposed in discussions with you was that first we would agree, subject of course to the Court's approval, upon an individual who would assume the position of chief executive officer and that that individual, if approved by the Court, would then undertake to make nominations without consultation in any way with us of the people that he would like to have on his board of directors. Those names would then be submitted to the Court for approval.

Q. Would El Paso reserve its right to object to any of those nominees?

A. No, sir. We expect to have no influence whatsoever. We're content to say that we won't even speak to the subject.

[fol. 454-158] Q. With respect to that last point, Mr. Boyd, it is anticipated as part of your plan, is it not, that New Company will have to seek a certificate from the Federal Power Commission?

A. That is correct.

Q. Will New Company do this solely on its own behalf, or will it participate with El Paso in this regard?

A. Having in mind that a presentation to the Federal Power Commission is an elaborate matter, exhibits in

minute detail reflecting on multiple subjects and filed in great number—I think you have to file seventeen copies or something of that sort—the mere physical preparation of such an application is both time-consuming and expensive. And so what we would contemplate is that our employees would do the physical job of putting this thing together to be filed with the Federal Power Commission. Otherwise, you've got to set up before the company even is authorized to do business, and before it has the benefit of any revenue, because, as we visualize the situation, you can't transfer these properties to New Company until it has a certificate from the Federal Power Commission; and until the transfer takes place, there will not be any revenue. Therefore, you've got the problem of how are you going to raise money to carry on the prosecution of the application to the Federal Power Commission. So we had expected to do that with our own employees, who are well trained in such matters.

[fol. 454-159] Q. Will the prosecution of that action be something of a joint venture between yourself and New Company?

Mr. Harrison: That's a leading question. I object to it.

The Court: Sustained.

By Mr. Lipson:

Q. Will it be a joint undertaking?

The Court: Sustained.

Mr. Lipson: May I rephrase the question to ask whether it will be a joint undertaking?

The Court: Sustained.

By Mr. Lipson:

Q. El Paso would work together with the New Company, would it not?

The Court: Sustained.

By Mr. Lipson:

Q. I would like to direct your attention, Mr. Boyd, to the debt of the New Company. Now, on what basis did El Paso make its allocation of the merged company's indebtedness between itself and the New Company under El Paso's divestiture? What were the standards that were used in making this determination?

A. You're addressing yourself simply to the amount?

Q. Yes, sir.

A. It was discussed. I just don't recall. I wouldn't want to hazard an answer. I'll refresh my recollection about it and be prepared to testify about it later in the day.

Q. For the moment let me direct your attention to the [fol. 454-160] testimony that you gave yesterday with respect to the roughly $59 million of improvements that El Paso has put on what used to be Pacific Northwest Pipeline since the date of the merger.

A. It was never there. And never—well, I think we understand each other. Go ahead.

Q. Will a portion of the debt allocated to New Company and to be assumed by New Company under your divestiture proposal reflect a proportionate share of that burden?

A. I think the only way I can answer that is the mortgage of New Company will constitute a lien on all of the properties, virtually all of the properties of New Company, yes.

Q. I understand—strike that, please. When did El Paso refinance the indebtedness of Pacific Northwest?

A. Well, I don't think it's appropriate to say that we refinanced it. At the time of the merger—

Q. Which is December 31, 1959?

A. Yes. December 31, 1959, since Pacific Northwest as of that day ceased to be a separate corporate entity, all of its obligations were assumed by El Paso Natural Gas Company.

Q. Was there subsequent to that date a refinancing of El Paso's indebtedness to combine what previously was

the separate indebtedness of Pacific Northwest with the indebtedness of El Paso?

A. As of that date the Pacific Northwest bonds were cancelled, and bonds in a like dollar amount were issued by El Paso Natural Gas Company.

[fol. 454-161] Q. To the same bondholders?

A. Yes.

Q. At the same interest rates?

A. Oh, they were delighted to get the same interest rate. In other words, they looked upon El Paso as being many times financially stronger than Pacific Northwest. Therefore, to secure an El Paso bond at the same interest rate that theretofore was applicable to a Pacific Northwest bond was most attractive to the security holders.

Q. With respect to the present debt structure of the El Paso Natural Gas Company, do the individual bonds in that structure date back through and before December 31, 1959?

A. You'll have to ask me that question again.

Mr. Harrison: You mean the date of issuance?

The Witness: You'd better ask me that question again.

(Question read.)

By Mr. Lipson:

Q. Were the obligations incurred prior to December 31, 1959?

A. Now, what obligations are you talking about?

Q. The obligations of El Paso in its present debt structure. The bonds that El Paso presently has outstanding. Do they date back before December 31, 1959?

Mr. Harrison: I don't understand the distinction be-

[fol. 454-162] tween "incurring the debt" on the date of the security. The date the security issued may not be the date on which the obligation was incurred. I suggest that counsel clarify it.

The Court: It's ambiguous to me.

The Witness: It is ambiguous to me. I don't even see what you're driving at.

The Court: You mean the present bonds were issued prior to the date you mentioned? Do you mean that there was—

Mr. Lipson: Yes, your Honor.

By Mr. Lipson:

Q. Were the present bonds of El Paso issued before December 31, 1959?

A. You're talking about a particular sheet of paper that has the name "bond" on it? And you want to know whether or not that was issued before 1958?

Q. No, before December 31, 1959.

A. Before December 31, 1959?

Q. Yes, sir.

A. Well, certainly, the debt evidenced by those sheets of paper in great magnitude existed prior to December 31, 1959. In other words, we had large bonded indebtedness prior to December 31, 1959. We have issued bonds since December 31, 1959, to cover expansion of El Paso's system.

Q. With respect to the bonds and other indebtednesses of Pacific Northwest that El Paso assumed after December 31, 1959, I ask you whether the same bond holders [fol. 454-163] continued to be creditors of El Paso, the merged company, at this time, to the same amount of debt?

A. I think what I'm about to say is in answer to your question. As I testified earlier, when Pacific Northwest was merged into El Paso, the bonds of Pacific Northwest were cancelled. El Paso issued bonds in a like dollar amount, and they were issued to the same people who held the Pacific Northwest bonds. For the most part, they were likewise people who held El Paso bonds. Most pipeline bonds are sold when they're privately placed to a relatively small group of institutional investors, about a hundred in name. And therefore, when El Paso issued its

bonds in satisfaction of the bonded indebtedness theretofore outstanding of Pacific Northwest, it went to the persons who theretofore had been holders of the Pacific Northwest bonds, but they were likewise in large measure holders of El Paso bonds.

Q. Now, these persons with respect to the Pacific Northwest bonds that they held could before December 31, 1959, only look to Pacific Northwest to satisfy their obligations?

A. That is correct.

Q. And after December 31, 1959, they could look to the merged company to satisfy their obligations?

A. That is correct.

Q. And these people are in a large part the same people represented by El Paso present debtors?

[fol. 454-164] A. There is some overlapping. I haven't undertaken to make any analysis to the extent of overlapping. Certainly in dollar amount there is considerable overlapping.

Mr. Lipson: Your Honor, I would merely want at this time to draw your attention to the fact that this lawsuit was filed July 22, 1957.

By Mr. Lipson:

Q. Mr. Boyd, as a matter of pipeline economics, are interest payments paid by a pipeline company in payment of its debt recoverable in its rate structure?

A. The interest payments as such do not become an expense item in the calculation of the cost of service.

Q. Are they recoverable in its rates in any form?

Mr. Harrison: Well, I would like to ask counsel about this line of questioning. I didn't understand that we were going into a rate proceeding there. I don't understand the materiality of this.

Mr. Lipson: If your Honor would like, I could explain the point. I understand that as part of the El Paso divestiture plan there will be an increase in the rate of interest

that the New Company will have to pay on its debt; that its proportionate share of the debt will go up across the board one-eighth of one per cent interest. And I believe Mr. Boyd has previously testified to this.

The Court: We've had testimony about that.

Mr. Lipson: Now, I'm merely inquiring at this point [fol. 454-165] whether those interest rate payments are recoverable to a pipeline.

Mr. Harrison: Well, I object to the question. It's incomprehensible. They can't recover interest in that manner, no matter how you proceed. This is just not a rate proceeding.

The Court: Well, as a matter of fact, I don't know what you're talking about. Will you rephrase the question?

Mr. Lipson: Yes, your Honor.

By Mr. Lipson:

Q. Does a pipeline company earn a return on interest payment on its debt?

The Court: Now, Mr. Bennett, I wish you wouldn't interrupt by conversing with the United States Attorney and conversing with government counsel. Why are you sitting at the table with government counsel, anyway?

Mr. Bennett: Well, your Honor, if you object, and I gather you do—

The Court: I don't object to it, but you bother me when you're carrying on these conversations when I'm trying to listen to what counsel is saying.

Mr. Bennett: For that I offer my apologies to the Court and won't do it again. If you wish me to remove myself from this seat, I'll be happy to do so.

The Court: Why don't you do it? And we don't have that trouble again.

[fol. 454-166] Mr. Bennett: Yes, your Honor.

The Court: All right. Proceed.

By Mr. Lipson:

Q. Mr. Boyd, who made the decision that the New Company would pay this extra one-eighth of one per cent?

A. The security holders.

Q. Who negotiated with the security holders?

A. El Paso Natural Gas Company. Largely Mr. Kayser, Mr. Warren, Mr. Evans, and I.

Q. In these negotiations with the security holders did you undertake to approach a different group of security holders than those who presently hold the El Paso debt to determine whether you could do better than the one-eighth of one per cent?

A. The answer to that is no, for the reason that it would have been obviously impossible to secure security holders—that is, to secure purchasers of these bonds, even at the rate with the one-eighth added to it. In other words, let me make that clear, Mr. Lipson. I don't think you understand the situation. These people had El Paso bonds, and they were pleased with them. And our problem was to get them to consent to release the lien on all of these properties that are going to be transferred to New Company. And although we satisfy them with basically the material that is contained in our plan of divestiture, that this was going to be a strong, healthy company that we expected the Court to establish, nevertheless, we were met with the arguments [fol. 454-167] that Pacific Northwest had been in financial difficulty not too many years before. And although we pointed out to them that through our efforts—and I'll defend the work that we put into that and the sacrifices that we made—but, anyhow, through our efforts those sales had gotten up to a volume where today if this New Company is launched, it will have healthy earnings. But nevertheless, it does not have a history of healthy earnings; and the history of healthy earnings is one of the factors that a security, prospective security purchaser takes into consideration in determining whether or not he wants the security.

Now, the way that we were able to get these security holders to agree to accept the securities of New Company in lieu of the securities of El Paso Natural Gas Company, which has had a long history of successful operations, was to provide some additional incentive. I might also say, when you go into what prompted them to do it, they recognized that the Supreme Court had ordered divestiture. And we're dealing with highly sophisticated institutional investors. And they wanted to be cooperative with the Court in bringing this about.

And as a result of long negotiations and discussions back and forth, first we provided—as a matter of fact, you may recall in our early discussions with you about approaching the security holders, we said we didn't think we could accomplish this without an additional interest rate of one [fol. 454-168] quarter of one per cent. But we told you we would try to do the very best that we could.

And so in our initial discussions we proposed one-eighth of one per cent additional interest applicable to the bonds only, and no additional interest applicable to the debentures. But that just fell on deaf ears. The security holders just indicated that was asking too much of them.

And so we then suggested that the one-eighth of one per cent additional interest be made applicable both to the bonds and the debentures. And only because we got the acquiescence of the big bond holders were we then able to sell it to the balance of the security holders. And we received considerable resistance from some of the smaller people that we contacted, saying that interest rates that these new bonds and debentures will carry were not appropriate to a company which so recently had been in financial difficulty and which did not have a history of earnings.

And they let us know that they were willing to go along reluctantly only because the very large holders had already indicated a willingness to do so.

Q. In the course of these negotiations that resulted in the extra one-eighth of one per cent interest on New Company's

share of the debt, did El Paso propose that it would assume part of this burden of the extra one-eighth of one per cent?

A. No. These are going to be bonds of New Company. [fol. 454-169] And we didn't propose that we would assume any of the interest rate that New Company was going to have to pay on its indebtedness.

Q. I'd like to direct your attention now, Mr. Boyd, to the matter concerning the West Coast Transmission Company's stock.

A. Yes, sir.

Q. I don't believe the record is complete as to the number of shares of West Coast Transmission Company's stock that are involved in our proposed sale. And would it refresh your recollection if I used the figure 1,127,750 shares?

A. It's about that, yes.

Q. And these are the number of shares that El Paso proposes to sell?

A. That is correct. They are all the shares that El Paso holds.

Q. What does El Paso propose to do with the proceeds of this sale?

A. Use it in its general corporate operations. In other words, we bought those shares. Now we propose to sell them.

Q. And New Company would not receive anything of the proceeds of this sale?

A. Of that particular sale?

Q. Yes, sir.

A. We don't propose to give them anything, no.

Q. Have you consulted with the prospective manager or management of the New Company on whether or not New [fol. 454-170] Company would prefer some other plan of disposing of these West Coast Transmission shares?

A. We felt that that was a matter for the Court to decide; and in view of the fact that we had bought and paid for these shares, and were ordered by the Supreme Court to divest ourselves of them, we felt that a sale was appropri-

ate, and that's what we have proposed, and they and we think there are many reasons why these shares should not go to New Company.

Q. You described the reasons. But I would just like to make—

A. No, I haven't described all of the reasons.

Q. You've described some of the reasons?

A. I've described some of the reasons, yes, sir.

Q. If I understand it directly then, none of the proceeds of the sale, apart from the shares themselves, none of the proceeds of the sale would go to New Company?

A. No. That is correct.

Q. To whom does El Paso presently expect to sell these shares?

A. As the proposed decree indicates, it would be to person or persons satisfactory to the Court.

Q. Have you conducted any negotiations with prospective buyers?

A. No, sir. We would expect to get the Court's approval of the plan before we made any such approval.

Q. You've discussed certain prospective buyers with the Department of Justice, have you not?

A. No, sir. You've made some inquiries of us as to [fol. 454-171] whether or not we thought they might be interested in it. Well, I take that back. I do think that in the course of discussions—and we've had lots of discussions about this, as you will recall—you did inquire whether some company might be interested in them. And I don't even remember what response was made to that, because we've always contemplated that would be sold to person or persons satisfactory to the Court. We may have volunteered that we thought some other company that we named might be interested in them, but we have not approached anybody with respect to the sale of these shares. We don't propose to do so until the Court indicates that that is the appropriate method of disposing of them.

Q. Do you anticipate selling these shares as a block or individually?

A. Whatever the Court directs us to do in that regard. We have no particular plan.

Q. During what length of time do you propose to dispose of these shares?

A. What we had proposed in our decree was that we be given a year in which to dispose of them. We'd be hopeful that we could dispose of them in that time. If we found that we couldn't, why, we would give notice to you and come back and ask the Court if we might not have some additional time in which to dispose of them.

Q. Would there be any trust arrangement for these shares in the interim period?

[fol. 454-172] A. Certainly we have no objection to it. We hadn't considered that.

Q. I'm sorry. I missed the last.

A. I say, we haven't even considered it, but we have no objection to putting them in a trust.

Q. Are there any other assets that formerly belonged to Pacific Northwest Pipeline that El Paso is not intending to return to New Company, other than these West Coast Transmission shares?

A. I'm not aware of anything, and if anything exists it must be de minimis. I'm just not aware of a single thing, but I'll check on that, Mr. Lipson, and give a categorical answer, because my present impression is that there is nothing.

Q. Mr. Boyd, I would like you to address your attention, if you may, to the matter of reservation that the New Company will hold. You testified to that on direct examination, do you recall?

A. Yes.

Q. Since the date of the stock acquisition by El Paso of Pacific Northwest, which we will take as January 1, 1957—

A. Yes, sir.

Q. —have any additional natural gas leaseholds been acquired or developed by El Paso in the San Juan Basin?

A. Yes.

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[fol. 454-173] Q. Since the date of the stock acquisition began in January 1, 1957, has any additional gas been purchased by El Paso under gas purchase contracts in the San Juan Basin?

A. Yes, sir.

Q. I would like to clarify a portion of your testimony given yesterday. You testified on what I have as page 22—

A. Well, you're richer than we are, Mr. Lipson. We don't have a copy of yesterday's transcript.

Q. I'd be pleased to share my riches with your counsel if he wants to read it.

The Court: I don't believe you can give away those.

Mr. Lipson: No, your Honor, I only meant to share them, not give them away.

Q. "Question: And also, of course, the reserves of Pacific Northwest itself in the San Juan Basin.

"Answer: And all of the reserves of Pacific Northwest in the San Juan Basin."

That was with respect to what you propose to return to New Company?

A. Yes, sir.

Q. Now, in speaking of reserves, did you refer to the cubic feet of gas that you obtained from Pacific, with Pacific Northwest, when you obtained the company, or were you referring to something else?

[fol. 454-174] A. What I referred to was that we propose to return to Pacific Northwest every leasehold—every contract. And if there's any other method of acquiring gas, we're going to return that, to Pacific Northwest, which we in turn got from Pacific Northwest. And in addition thereto, those things that I mentioned. All of the reserves that have been acquired by El Paso during the period of the merger in the Rocky Mountain area and the King's Gate Gas to which I testified at some length yesterday. Now, if your Honor is interested in the magnitude of those, I'm prepared to address myself to that.

Q. Mr. Boyd, you do not then propose to return to New Company the same number of cubic feet of gas that that

company had in reserve in the San Juan Basin as of January 1, 1957?

Mr. Harrison: I do not understand how that question can possibly be answered, if your Honor please. It could mean "develop from time to time." No one knows how many cubic feet of gas were under that ground at any time.

The Court: Mr. Lipson, the witness offered to tell you more in detail about this. He said, "If I wanted it." I have no desire to improve upon your examination. If you want him to go ahead and tell you the magnitude of it as he describes it, if that answers your question, go ahead.

Mr. Lipson: I just want to make sure that the record properly reflects Mr. Boyd's intent, because he spoke of reserves that will be returned to Pacific Northwest. And [fol. 154-175] I would like to establish whether the reserves he's referring to mean cubic feet of gas or an accumulation of wells, lease holds, and other properties.

The Witness: We use the term "reserves" loosely. Now, reserves, as you know, are things that are under the ground. They are sometimes difficult to count. What we're proposing to return to Pacific Northwest is exactly what we got from them. Now, when the merger took place, there was an assignment to us of leases, there was an assignment to us of contracts. Those are the instruments by which you obtained title to and the right to reserves. Now, what we're doing is transferring those things right over to New Company.

By Mr. Lipson:

Q. You are transferring to New Company the wells, leases, and other properties? Is that not—

A. Well, leases, contracts, well ties that we've built, wells that we've drilled. I might say that in the San Juan Basin to which you're addressing yourself, during the period of the stock acquisition, from January 1, 1957, to December 31, 1959, we added to properties that we now propose to

transfer to New Company in the San Juan Basin by way of wells that were drilled, wells, ties that were erected, and gathering system that will go over to New Company, something in excess of $20 million worth of investment; from the period December 31, 1959, up to a reasonably current date we have added to that approximately another $15 million worth of improvements expressed in the—or evi- [fol. 454-176] denced in the form of additional wells drilled, well ties built, gathering built, which we propose to transfer to New Company. What I'm trying to say, Mr. Lipson, is that we're not only transferring leases and contracts, but we're transferring the improvements that have been made on those leases.

Q. With respect to the wells and leases that you received from Pacific Northwest and that you are transferring back to New Company, what provision if any is El Paso making to make up for the amount of gas that has been depleted from those wells in the previous eight years?

A. Well, I'll give you that figure. From the time of stock acquisition up to a reasonably current date, there has been sold or constmed on what we call the Northwest Division approximately 103 trillion—I mean, 1.3 trillion cubic feet. What we will add to the reserves of New Company that they did not have, that Pacific Northwest did not have when we acquired Pacific Northwest, is approximately 3 trillion cubic feet of gas. Thus, when you subtract the production of 1.3 trillion from the additions of three trillion, New Company will be launched with 1.7 trillion cubic feet of more gas than Pacific Northwest had at the time we acquired the stock.

Q. That was January 1, 1957?

A. Approximately that.

Q. Do you have corresponding figures for the date of the [fol. 454-177] merger, December 31, 1959?

A. I don't have those figures, but they can be obtained for you.

Q. I show you a document marked Exhibit No. 3 for identification, Mr. Boyd. I ask you if you are able to identify that document as being an El Paso response to a request for information relating to gas reserves.

A. I know you asked us for a lot of information, and we furnished a lot of information. All I can say is that this looks like one of many documents that we gave to you, Mr. Lipson.

Q. It was prepared by El Paso?

A. Yes, that's right. Prepared by our people.

Q. Does Tab 1 of that document list the lease holds that were acquired by El Paso from January 1, 1959, through approximately September, 1964?

A. I think it's self-explanatory. All I could do would be to read the table of contents. If you'd like me to do so, I will do so.

Q. I would.

A. Well, the table of contents indicates—

The Court: Well, I think we're back to what we were doing yesterday. Is that exhibit in evidence? If it is, I can read it.

Mr. Lipson: No, your Honor, it's not an exhibit in [fol. 454-178] evidence.

The Court: Then I shouldn't read it at all.

OFFERS IN EVIDENCE

Mr. Lipson: I'll be pleased to offer it, however. I'd like to show it to counsel for examination and possible objection.

Mr. Harrison: I don't understand what the purpose of this is, your Honor, but it was given by the company, and I have no objection.

The Court: Received.

(Document marked Plaintiff's Exhibit No. 3 for identification was received in evidence.)

Mr. Harrison: May I have a copy of the exhibit?

Mr. Lipson: I only have two copies. Yes, you can. (Handing.)

Mr. Lipson: With your Honor's permission, I would just like to read the table of contents of this document, so that it will be obvious to your Honor the nature of the information contained in here, which is principally that of tabulations.

The Court: All right.

Mr. Lipson: "Table of Contents under Tab 1. List of lease holds acquired by El Paso Natural Gas Company from January 1, 1957, to date. Pacific Northwest Pipeline Corporation did not enter into any lease hold acquisitions during this period. The reserves attributable to each such [fol. 454-179] acquisition are shown on this schedule."

Under Tab 2. "List of gas purchase contracts entered into by El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation since January 1, 1957, to date. The contracts entered into by Pacific Northwest Pipeline Corporation are denoted by an X. The contracts which are cancelled are denoted by an astprisk."

The tabulation itself is broken down geographically by the different counties in the various states.

By Mr. Lipson:

Q. Mr. Boyd, is it your testimony that El Paso is transferring to New Company all the gas reserves that it owns north of the San Juan Basin in the Rocky Mountain areas?

A. All of the commercial gas reserves.

Q. Well then, there are gas reserves in Colorado, Utah, Nevada, Wyoming, that El Paso is retaining?

A. Well, I don't know—I don't know where they are located, because they're of such little value that—little commercial value—that I haven't even undertaken to pinpoint where they are. There is one that I know to be in Wyoming. It's called Pinedale. We have spent I think something in—by the way, we had Pinedale long before the stock acquisi-

tion. We've spent something like $5 million drilling in Pinedale. Although we're satisfied that there is a large amount of gas there, the formation is so insufferably tight that we [fol. 454-180] question whether or not you can economically move a single cubic foot of that gas.

In other words, there will have to be some new method of fracking not now known to the industry before that gas can become commercial.

I might say that we would be delighted to give New Company an option, or anybody else, an option to buy Pinedale from us at our book cost.

Now, that's the sort of thing that I'm talking about. Now, in addition to that, there are some very small reserves which, I think in all instances, were owned by El Paso before the stock acquisition, which are presently dedicated to the service of some very small communities.

Q. Mr. Boyd, I'd like to show you a chart entitled, "El Paso Natural Gas Company, Assets of El Paso Natural Gas Company in States of Washington, Idaho, Oregon, Wyoming, Nevada, Utah other than Aneth, and Colorado other than San Juan Basin, to be retained after divestiture."

I'd like to ask you whether that chart refreshes your recollection about whether or not these properties to be retained were in several aspects acquired by El Paso after the date of the stock acquisition.

A. Well, I'd have to—it speaks for itself. I would have to examine it. I see here one thing that we acquired at a cost of $400 after the stock acquisition. I see—

[fol. 454-181] The Court: Is this the exhibit we just received?

Mr. Lipson: No, your Honor. This is another exhibit.

The Court: Is it in evidence?

Mr. Lipson: It is not, but I would be pleased to offer it in evidence.

The Court: I wish you'd get these things in evidence.

Mr. Lipson: Yes, your Honor. Would the clerk mark this?

Mr. Harrison: As I understand it, Mr. Lipson, both of these were documents delivered by Mr. Boyd to you?

Mr. Lipson: That is correct.

The Witness: Your Honor, there are probably 25 things that we acquired—

The Court: Well—

The Witness: At a total cost of $80,000. I must confess I have no individual acquaintanceship with these things, and I'm satisfied they fall into the category that I was previously talking about.

The Court: Do you offer it?

Mr. Lipson: I offer it, your Honor.

The Court: Any objection?

Mr. Harrison: No objection.

The Court: Received.

[fol. 454-182] (Document marked Plaintiff's Exhibit No. 4 for identification was received in evidence.)

A. I beg your pardon. Your Honor, I said dollars. I see that's acres. It amounts to 80,000 acres. And the dollar amount is $4,345,000. But included in that is Pinedale that I was just mentioning, the cost of which—that is, this represents our investment—of $4,345,000. And we'd be delighted to have anybody take it off our hands at that price.

By Mr. Lipson:

Q. I'd like the record to be clear on the figures, Mr. Boyd. I'd like you to check and see whether $4 million is the accurate figure, or whether $7 million is closer to being accurate.

A. You're showing me another page now.

Q. I'm sorry. It's the same chart.

A. You've shown me one page, and now you're showing me another page. On that page is a figure of $7,166,000.

Q. That figure relates to wells, does it not, the value of wells?

A. That is correct. And while we're talking about this, let me point out that the big item in that is Pinedale, which

we acquired in February of 1954, which was three years before the stock acquisition.

Q. And the other item is leases, and the figure on that is $1,681,000, is it not?

A. That is correct. Leases, $1,681,000, that's right.

[fol. 454-183] Q. And there's another item called Transmission Property, but there the figure is only $36,000?

A. It's just listed as "Other," isn't it? Yes. Other investment. Sumas Meter station, $36,000.

Q. And that in total amounts to 220,000 net acres?

A. That is correct. They all fall into the group that I just mentioned.

Q. I show you Government's exhibit marked No. 5 for identification, which is the El Paso Natural Gas Company 1962 Annual Report. Do you identify it as such?

A. Yes. I recognize it.

Mr. Lipson: I offer the 1962 Annual Report, your Honor.

Mr. Harrison: No objection.

The Court: Received.

(Document marked Plaintiff's Exhibit No. 5 for identification received in evidence.)

The Witness: I see there are some pencil notations on the first page.

By Mr. Lipson:

Q. I'm sorry. I would give you a clean copy.

The Court: Which one is marked? The one with the pencil notations or the other one?

Mr. Lipson: I'll remove the sticker and transfer it.

The Court: You don't claim anything for any notations [fol. 454-184] on it, of course?

Mr. Lipson: No, sir.

The Court: Received.

Mr. Lipson: Your Honor, I would like to draw the Court's attention to a statement on page 14 and page 15

of the annual report under the heading, "Proposed Acquisition of Additional Reserves."

"In September of 1962 the company entered into an agreement whereby it will acquire an important additional source of high pressure gas well gas situated centrally in the company's existing San Juan Basin Gathering System in San Juan and Rio Arriba counties, New Mexico. The proven gas reserves which will become available to the company under the agreement are estimated at 780 billion cubic feet. The reserves are located in the Dakota Formation, which is the deepest of the producing gas formations in that part of the San Juan Basin. Pursuant to such agreement the company will purchase the gas from Southwest Production Company as produced and will advance to Southwest the sum of $28,490,655 evidenced by interest-bearing notes to be used by Southwest in its acquisition of the Dakota leasehold rights."

And I am skipping. And I'll continue on page 15.

"The gas reserves which the company proposes to acquire under the arrangement described above will be of particular value to the company in serving its existing cus- [fol. 454-185] tomers. In addition to being an area of production already connected to the company's transmission system, such reserves are situated in relation to the company's other sources of gas supply nearest to the California markets. Furthermore, the gas well nature of the reserves will represent an additional improvement of the ratio of dry gas to residue gas of the company's gas supply. Southwest is to engage in a drilling program for the optimum development of the reserves over a five-year period. Thus, production and delivery of a major portion of the gas will be deferred until after the five-year development period and will then be available to meet market requirements in California and other area served by the company."

By Mr. Lipson:

Q. Mr. Boyd, as part of the El Paso divestiture plan, is there any provision to allocate any portion of the gas referred to in the quotation I've just read, to New Company?

A. No, sir.

Q. Mr. Boyd, you testified previously with respect to the concept of reserve life index. Do you recall that testimony?

A. Yes, sir.

Q. Would you refresh my recollection as to El Paso present reserve life index?

A. El Paso's—well, are you talking about as of—prior to divestiture or after divestiture, or both?

[fol. 454-186] Q. Both.

A. Well, I can give it to you after divestiture, and I can approximate what it is prior to divestiture. After divestiture El Paso's life index will be 26.8 years. The life index of New Company will be 27.4 years. I think the life index of the merged company is approximately 27 years.

Q. El Paso is presently engaged in a proposal before the Federal Power Commission, is it not, to build an additional pipeline to California?

A. Well, it's to loop and add compression. And if you want to get into the engineering features of it, you'll have to talk to somebody else. But I use the term, it's to "beef" up a part of our present system to make additional deliveries to California. In addition to that, we have a supplemental application which we do not expect the Federal Power Commission to grant, for the reason that we don't think such quantity of gas is needed out there. But that does contemplate the building of an entirely new line.

[fol. 454-187] Q. What is the capacity of that line that you just spoke of?

A. Which?

Mr. Harrison: I submit the witness has testified as to his proposals to the Commission, but I submit to question further about proceedings before the Commission is beyond this Court's concern.

Mr. Lipson: Your Honor, I just want to determine the amount of gas that a pipeline to California has to carry in order to be economic—

The Court: What bearing does that have on this lawsuit?

Mr. Lipson: Well, as I understand the Supreme Court's decision, your Honor, it was premised largely on the ability that the Pacific Northwest had previously evidenced to serve the California market, and I think that—

Mr. Harrison: I would like to argue that, if your Honor please, if that assertion is being made; and I think, if it is being made, that we should discuss the law now. The witness shouldn't.

The Court: Well, I am not ready to discuss the law with you. We will do that when we get the evidence in. Go ahead. Proceed.

Mr. Lipson: Thank you, your Honor.

By Mr. Lipson:

Q. With respect to the two proposals that you just spoke of, which has the least capacity? Which is the smaller of [fol. 454-188] the two?

Mr. Harrison: I object to this as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. The one application which contemplates beefing up our existing system by looping in certain areas and adding compression in other areas seeks authorization to make deliveries to California in the amount of 250-million cubic feet per day. The supplement to that application seeks authorization to deliver to California an additional 585 million feet per day.

Q. How much gas was El Paso required—

A. I think Mr. Harkaway suggested it should be 565, but it is somewhere in that range, 565 or 585, somewhere in that range.

Q. Would you identify Mr. Harkaway?

A. Yes. Mr. Harkaway is sitting next to Mr. Solomon, and he is Commission's counsel in that proceeding and knows it far better than I do.

Q. How much gas has El Paso been required to accommulate in order to support the 250 million proposal?

A. How much gas?

Q. Gas reserve.

The Court: I think we are getting into Commission proceedings. Here we are going to have Mr. Harkaway on the [454-189] stand pretty soon.

Mr. Lipson: I hope not.

The Court: Well, he has already testified. Excuse me. This is a terribly obnoxious thing.

Mr. Lipson: Your Honor, the ability of a company to build a line to California is, of course, predicated on gas reserves it has available to stand as a foundation of that line. I would merely want to determine from Mr. Boyd at this time the magnitude of the reserves required by El Paso to stand behind its smaller of the two proposals.

The Court: All right, go ahead.

A. Mr. Lipson, you get into something that may be complex to answer. Basically, the Federal Power Commission historically has taken the position that reserves are not dedicated to a particular customer and therefore when you make your application to the Federal Power Commission you don't say that, "Now, we want to serve 250 million cubic feet to California and over here is the 250 million cubic feet that we have bought for that purpose."

In order to secure a certificate from the Federal Power Commission you must show that you have adequate reserves to serve all of your requirements, past and future, and, as I testified yesterday, what heretofore was considered to be adequate—but this is not an inflexible rule; it fluctuates, dependent upon the ability of a company, be- [fol. 454-190] cause of its proximity to prolific or uncommitted gas reserves, to replenish its supply; but, as a rule

of thumb, in the past the Federal Power Commission took the position that before a company could obtain a new certificate to build facilities to make additional deliveries to a particular market you had to show that you had taken into account in the new service approximately a 12-year deliverability life.

Now, with that in mind, any properly managed pipeline company should always be out replenishing the reserves as they are used up, and you can get a lot of argument about whether you ought to have a 12-year deliverability life or a ten-year deliverability life or, depending upon the location of the pipeline, whether it ought to be an eight-year deliverability life. There is no hard and fast rule about that. I think I sense the feeling of the Federal Power Commission. There has been so much expression that a twelve-year deliverability life is too long, requiring investment that the customers have to, in the last analysis, pay, that it is not justified by the public interest and that therefore something short of a twelve-year deliverability life will justify the issuance of a new certificate. And I can cite you to any number of cases where certificates have been granted in situations where there was less than a twelve-year deliverability life demonstrated.

Q. Can you give me an answer in terms of thousands of [fol. 454-191] cubic feet as to how much gas it would have to stand behind increment of 250 million per day to California?

A. Well, here again it would be—well, what I have been trying to say is that it doesn't stand behind the increment of 250 million. It stands behind your total obligation. You have to show that you have a deliverability life, but not just to take care of a 250 million; you have to show that you have a deliverability life adequate to take care of your total requirements, including that which you—for which you are seeking a certificate.

Q. Well, on an arithmetical basis you would need more gas to serve an increment of 250 million than you would need if you did not have to serve that—

The Court: I think the witness has answered the question the only way it can be answered.

By Mr. Lipson:

Q. What would be the effect of an additional increment of 250 million on your company—El Paso's present reserve life index that you have testified to?

A. That is a mathematical calculation. Do you want me to make it? You mean what would be our deliverability life if we did not take into account the 250 million proposed delivery?

Q. I was referring to reserve life index, not deliverability life.

A. Now, talking about something else, because deliverability life that I have been talking about in terms of twelve [fol. 454-192] years is one thing. Life index is something else again.

Q. You have previously stated that after divestiture El Paso would have 26.8 years as its reserve life index.

A. That's correct.

Q. I am just asking whether this is with or without the 250 million that you are proposing.

A. If you are addressing yourself now to reserve life index, the 250 million application would have no bearing upon the reserve life index one way or another. Would neither lengthen it nor shorten it.

Q. Assuming for the moment that in the preceding year El Paso delivered an additional 250 million, would that have an effect—

A. Yes, it would.

Q. (Continuing)—on the reserve life index?

A. Yes, it would.

Q. What would that effect be?

A. I would have to make a calculation.

Q. In general would it reduce it or increase it?

The Court: I don't understand what you are getting at. Read that.

(Record read.)

A. On the assumption that you make, it would reduce the reserve life index.

By Mr. Lipson:

Q. I understand that in general other companies are com-
[Vol. 454-193] peting with El Paso in this application to serve California, is that correct?

Mr. Harrison: I object. This is wholly immaterial, if your Honor please.

The Court: Yes, of course it is. Sustained.

Mr. Lipson: I will withdraw it.

By Mr. Lipson:

Q. What would happen to the reserves that El Paso has accumulated to serve this 250 million increment should it not be awarded that certificate?

Mr. Harrison: I object in that it assumes something on which there is no evidence.

The Court: Will you read the question.

(Question read.)

The Court: Sustained.

By Mr. Lipson:

Q. Would El Paso have reserves in excess of its require-
ments if it did not obtain that certificate which it presently seeks?

Mr. Harrison: I submit I don't understand that question, if your Honor please. No definition of "requirements," no definition of "reserves," and I don't know what the question means.

The Court: Yes, I think we are going to have to ponder that while we have lunch. We will return at two o'clock.

(Whereupon a recess was taken until two o'clock of the same day.)

[fol. 454-194]

AFTERNOON SESSION

December 3, 1964, 2:00 p.m.

Mr. Lipson: Your Honor, the Government respectfully requests the Court's indulgence at this time to put a witness on out of the normal order.

The Court: You may.

Mr. Lipson: Thank you, your Honor. Mr. Noble will examine the witness.

Mr. Noble: The Government calls Mr. A. J. Rowe.

ALVIN J. ROWE, JR. called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Noble:

Q. Would you state your name and address, please?

A. My name is Alvin J. Rowe, Jr. I reside at 7 Bermuda Court, McLean, Virginia.

Q. What is your business, Mr. Rowe?

A. I'm associated with the firm of Van Scoyoc & Wiskup, public utilities consultants in Washington, D. C.

Q. And what is your position with that firm?

A. I am a staff member in an accounting capacity.

Q. Would you please outline your educational background and your professional experience, particularly insofar as it relates to the regulation of utilities?

[fol. 454-195] A. I was graduated from the University of Georgia in 1950 with a degree of Bachelor of Business Administration, with a major in Accountancy. Upon graduation I joined the firm of Arthur Andersen & Company, a firm, national firm of public accountants. In March of 1951 I was recalled into the service during the Korean War and served as the fiscal officer of Air Proving Ground

Command. I returned to civilian life in December of 1952 and rejoined the staff of Arthur Andersen & Company. While I was with Arthur Andersen & Company, I was engaged in the audits of many of the larger utilities of the south and the midwest. And my engagements covered electric, gas, telephone, and urban transit engagements.

In addition thereto, I was a member of a special staff of that firm which was engaged in regulatory matters, such as the installation of unit property records and advice to companies engaged in regulatory activities.

In April of 1956 I left Arthur Andersen and joined the staff of the Georgia Public Service Commission.

Q. And what was your position with the Georgia Public Service Commission?

A. I was chief accountant of the Georgia Commission and in that capacity was the senior staff member in charge of all rate matters, accounting matters, and issuances of securities for electric, telephone, gas, and urban transit utilities. I was the member in charge of the staff investi- [fol. 454-196] gations that were made and proceedings before that commission and conducted the presentation of the staff case. I was also the authorized staff representative of the commission to appear before the Federal Power Commission and the Federal Communications Commission.

In addition I was a member of the National Association of Railroad and Utilities Commissioners Committee on Depreciation and the Special Telephone Committee. While I was a member of the Special Telephone Committee I was one of the members that prepared the so-called Telephone Separations Manual, which is a manual used in regulatory practices for the allocations of property, plant, revenues, between the various regulatory jurisdictions for regulatory purposes.

In October of 1960 I left the Georgia Commission and joined the firm of Van Scoyoc & Wiskup.

Q. And what have been your duties with that firm?

A. Well, since then I have been engaged entirely in regulatory matters in the preparation of cost of service

presentations and other evidence to present before various commissions, and in special investigations for our clients on regulatory matters. And in that capacity I have given testimony before the Federal Power Commission, the North Carolina Utilities Commission, the Alabama Public Utilities Commission, and the Public Utilities Commission of Ohio.

Q. And have your professional qualifications been recog-
[fol. 454-197] nized by any state?

A. Yes, I am a certified public accountant in the state of Georgia. My certificate number is 1164.

Q. Are you a member of any professional organizations?

A. Yes. I'm a member of the American Institute of Certified Public Accountants and the District of Columbia Institute of Certified Public Accountants.

Q. Mr. Rowe, have you studied the El Paso proposal of divestiture?

A. Yes, sir, I have.

Q. In your study have you focused on any particular aspects of the divestiture?

A. I have focused primarily on the financial aspects of it.

Q. Have you consulted any materials or information in addition to the plan itself?

A. Yes. I have studied the work papers of the company as submitted in the current proceeding before the Federal Power Commission for service to California, which is El Paso Docket C P-64-76. And I have studied the work papers that El Paso has submitted both prior to the order for divestiture and as corrected to reflect the exclusion of New Company after divestiture. And I have also studied the responses of El Paso to inquiries of the Justice Department.

Q. Mr. Rowe, I will show you a document which has been marked for identification as Plaintiff's Exhibit No. 6 [fol. 454-198] and ask if you will state what that purports to be.

A. It purports to be the response of El Paso to a letter from the Justice Department dated October 23, 1964.

Q. And have you reviewed portions of this document?

A. Yes, I have.

Q. Mr. Rowe, an issue has been raised in these proceedings regarding certain tax loss carryovers which Pacific Northwest had at the time of the merger.

Mr. Harrison: I didn't hear the question, please.

The Court: Read it, Miss Hallam. It isn't Miss Hallam. Ron, will you read it?

(Question read.)

By Mr. Noble:

Q. In connection with your study of the financial aspects of the transaction, have you inquired into this particular aspect of it?

A. Yes, I have.

Q. May I ask you to refer to Government's Exhibit marked for identification No. 6 and state whether that document indicates whether there were any federal income tax loss carryovers available which were used by El Paso Natural Gas Company to reduce their income tax liabilities?

A. Yes. This document indicates that—

Q. Would you state the tab number you're referring to?

A. This is Tab No. 6, and with the specific reference to the first three sheets under that tab. And it indicates that—

[fol. 454-199] The Court: Well, you can't tell us about it until we get it in evidence. Is this in evidence?

Offer in Evidence

Mr. Noble: I offer it, your Honor.

Mr. Harrison: Well, may I reserve objections, because it's a big document, and there are a lot of tabs, and I haven't been able to look at them.

The Court: All right. Proceed.

Mr. Noble: I might state, your Honor, that it is a document prepared by El Paso in response to questions submitted to it by the government.

The Court: Well, I'm going to receive it subject to your right to call anything to my attention.

(Document marked Plaintiff's Exhibit No. 6 for identification received in evidence.)

By Mr. Noble:

Q. Is there a pending question?

A. Yes. The document in question—under Tab 6 in the first three sheets it indicates that Pacific Northwest Pipeline Corporation and its subsidiaries had net taxable losses for the period 1955 through 1959 of $53,820,698.99.

Q. That figure is arrived at by a summation of the figures in the columns under the various years?

A. It is a summation of the figures, with the exception of the first one, line 19 of sheet 1 and 3 and the figures on line 12 of sheet 3.

Q. Mr. Rowe, can you state whether Pacific Northwest [fol. 454-200] would have received some benefit from these tax deductions had it remained an independent company?

Mr. Harrison: I submit, if your Honor please, that's totally dependent on many factors that are not known to this witness or to anyone else, including what he would have earned or lost if anything during that time. This is merely a factor that enters into a tax return of a taxpayer and determines how much will be paid to the government. What Pacific Northwest would have done is totally unknown to me or this witness or to anyone else; and what it would have paid in taxes is totally unknown.

The Court: Read the question.

(Question read.)

The Court: Sustained.

Mr. Noble: Your Honor—

The Court: No use arguing that, counsel. When I make a ruling, I don't want to hear any argument on it.

By Mr. Noble:

Q. Mr. Rowe, does El Paso's plan of divestiture propose to account to New Company for the benefit which El Paso has received from the Pacific Northwest tax loss carryover?

Mr. Harrison: I object on the ground that the plan speaks for itself.

The Court: Read it.

(Question read.)

The Court: Sustained.

[fol. 454-201] Mr. Noble: Excuse me, your Honor. Did I understand Mr. Harrison stipulated that it does not provide for that?

The Court: No. Mr. Harrison raised an objection on the basis that the plan speaks for itself. Don't ask this witness what the plan says. That's the basis for the ruling.

By Mr. Noble:

Q. Mr. Rowe, is there an accepted accounting procedure by which El Paso could account to New Company?

Mr. Harrison: I'm sorry. I again lost it.

The Court: Read it.

(Question read.)

Mr. Harrison: If your Honor please, the tax laws provide how you compute your taxes.

Mr. Noble: Your Honor, the point is that El Paso—or, Pacific Northwest at the time of the merger had certain tax loss carryovers which constituted a valuable asset, in that they were usable in the future to reduce its tax burden.

The Court: If they had any income.

Mr. Noble: Correct. Now, El Paso has derived benefit from those tax loss carryovers in that it has reduced El Paso's loss during the period of the merger. My question is whether there is an accepted accounting procedure by which any benefit obtained by El Paso could be made good to the New Company.

Mr. Harrison: There is no such thing as an accounting [fol. 454-202] procedure changing the tax laws or the simple tax. If it please the Court this is simply an attempt to go back into the past earnings of El Paso Natural Gas Company; and its past earnings are affected, of course, by the taxes it pays under the tax laws in accounting to this Court for what it has done by way of earnings and taxes for the past eight years. Now, this witness can't change the law, and it can't change the earnings. I submit the question is incompetent, irrelevant, and immaterial.

The Court: Well, as I understand the question, Mr. Harrison, it is this. Pacific Northwest had some tax carryovers that might have been a benefit to them if it had any income against which it takes a deduction. After the merger El Paso was entitled to take those carryovers against combined income. Now, what they're driving at is whether or not there is any accounting procedure by means of which you can determine what benefit El Paso got from those Pacific Northwest loss carryovers. Now, if there is some such accounting procedure and if by means of that procedure it determined that El Paso got X dollars worth of benefit on its tax return, then apparently somebody is going to claim that El Paso in this divestiture ought to make good to New Company benefits El Paso got from the Pacific Northwest loss carryovers.

Mr. Harrison: Yes, your Honor. And that legal question we'd be glad to test with the Court and argue with [fol. 454-203] counsel. We do not think it is entitled to an accounting for the financial experience of the past eight years, which includes the taxes paid to the United States and tax loss carryovers, and losses suffered in carrying the assets in the business of this lost company.

All that I'm objecting to now in this question is that the witness can't change any of these things. We can determine very readily what the loss was, and that's the amount that was deductible. And if that amount is deductible, then counsel can argue from that premise, but he can't change the law or the premise by asking this witness about any accounting procedures.

Mr. Noble: Your Honor, if I may speak to that point, while I would agree—

The Court: Well, isn't the simple way to get at this to look at the El Paso Natural Gas Company's income tax returns for the years following the merger and see what they did with those loss carryovers? I don't know. That's going to appear on the income tax returns. And you're saying is there some accounting procedure by which to measure the benefit. I suppose those returns will show the benefit.

Mr. Noble: Not only by which you measure the benefit, your Honor, but by which El Paso could account to the New Company for the benefit.

The Court: Oh, well, whether El Paso owes them any-
[fol. 454-204] thing, or ought in this divestiture, more properly to put it, ought in this divestiture to be required to turn over to New Company or some property equivalent to the benefit that El Paso might have obtained on their income tax return for the use of those carryovers is something this winess can't address himself to. I agree with Mr. Harrison. That's a question for the Court.

One of the things, of course, we're going to have to determine is what must El Paso turn into the New Company to make the New Company, which stands in the position of Pacific Northwest Gas Pipeline, whole.

Now, what assets must it turn over to them? Now, this may very well be a question that counsel will want to talk with the Court about as a legal question. And so far as the accounting procedure is concerned, it doesn't take any great brain to figure that out. Those tax returns are going to disclose that.

The objection is sustained.

Mr. Noble: All right, your Honor.

By Mr. Noble:

Q. Mr. Rowe, were there options available to Pacific Northwest the exercise of which would have permitted it to delay the incurrence of the tax losses until a time when it had such income as it could have offset—

Mr. Harrison: I object. Purely conjectural, if your Honor please.

[fol. 454-205] The Court: Sustained. It certainly is conjectural. As a matter of fact, it's in the record of these cases that Pacific Northwest was about to fold. They were in very dire financial straits. That's in the record in this case. The objection is sustained.

Mr. Noble: I have no further questions.

Howard Boyd recalled as a witness on behalf of the plaintiff, having been heretofore duly sworn, testified further as follows:

Cross examination (Continued):

The Witness: If your Honor please, Mr. Lipson asked me this morning for some information, as to which I said I would get it during the noon recess. I have it, if you'd like me to read it into the record now.

By Mr. Lipson:

Q. There were two items, as I recall. Which one are you referring to?

A. Well, one, you asked me what was the consumption of the Northwest Division during the period of the merger; namely, from December 31, 1959, to date, and the acquisitions during that period which we propose to turn over to the New Company. The consumption during that period

was 832 billion cubic feet, and the acquisitions during that period which we propose to turn over to the New Company were 1,177 billion cubic feet.

Q. May I ask you whether that figure includes the Kings [fol. 454-206] Gate gas?

A. Yes. That does include the King Gate gas. The Kings Gate gas, amounting to 1,020 billion cubic feet. And, Mr. Lipson, you had me identify this morning Government's Exhibit 3. In order to bring that up to date and make it accurate, there should be a substitution of four pages, which I'd like to hand to you. Copies of it. And also, there should be a change made on what appears as GR-75.

Q. Is there a way of identifying the page you're referring to?

A. I think that does identify it, Mr. Lipson. These things seem to be in numerical order. It's under Tab 2, toward the back.

Q. GR-75?

A. GR-75. Do you see that?

Q. Big Piney area dry gas?

A. Yes, that's correct. Go over to the extreme right-hand column. And—

Q. Under "original reserves"?

A. Under "original reserves." The second figure there should read 207.7.

Q. Are you referring to 74.8?

A. Yes, that's right. Instead of 74.8 it should read 207.7.

Q. May I ask on what basis that change was arrived at?

A. Yes, because an examination of the contracts indicated that during the period of the merger we negotiated [fol. 454-207] a contract with Belco Petroleum Corporation for additional reserves, which additional reserves we propose to turn over to New Company.

Q. When did you make this correction, Mr. Boyd?

A. Right now.

Q. You went over the contract between—at the beginning of recess?

A. Oh, no. Look, Mr. Lipson, I guess there are thousands of contracts that are referred to here; and in putting this material together at your request we found that there was simply an error made in one of them.

Q. My remark is merely directed to the fact that you did not notify us previously of this change.

The Court: My goodness gracious, he's asking to make a change in a figure in the exhibit on the basis that the figure there is in error. Why do you have to make a production out of that?

Mr. Lipson: Your Honor, with respect to the first series of changes that Mr. Boyd referred to, we would like to have an opportunity to look at them. It's a tabulation of many pages.

The Court: Put in anything you want. Do anything you want.

Mr. Lipson: Thank you, your Honor.

By Mr. Lipson:

Q. You stated in your testimony this morning that you would be prepared to discuss the standards by which the [fol. 454-208] allocation of debt between El Paso and New Company was arrived at. Are you prepared to do so?

A. Yes. I am. What we did was to arrive at a capitalization for New Company which would be in the maximum interest of New Company, the consumers, and still fit the standards customarily required by the Federal Power Commission for the issuance of certificates to New Company. With that in mind, we provided for first mortgage pipeline bonds in a percentage of capitalization slightly less than sixty per cent. You will find that in many, many cases where applications have been made by new companies, the bonded indebtedness runs in the neighborhood of sixty per cent. On the debentures we provided a percentage which when added to the bonds gave a total indebtedness, when you also added the small bank loan which came up to an indebtedness that the Federal Power Com-

mission frequently uses in approving applications for new pipeline companies; namely, it's an aggregate indebtedness of about 75 per cent, with an equity of about 25 per cent. And as you will observe, the indebtedness that is provided for here comes up with a total outstanding debt of 74.58 per cent and a common equity percentage of 25.42 per cent.

Q. Would the total capitalization of New Company change in any respect if the assets to be divested to New Company were different than those in your plan?

A. Yes.

[fol. 454-209] Q. Generally, the more assets—

A. Well, wait a minute now. You say would the capitalization differ?

Q. Yes, sir.

A. These ratios?

Q. Not the ratios. The total capitalization.

The Court: Read the question.

(Question read.)

The Witness: Of course, there have to be a lot of additional—

Mr. Harrison: I agree they would. Agree they would.

Mr. Lipson: I'll take the stipulation, if it's offered in that sense.

Mr. Harrison: Yes.

By Mr. Lipson:

Q. Then, the determination of the capitalization of the New Company is based on a decision that is being made as to the assets that the New Company is to receive; is that correct?

A. That's one of the factors that goes into the capitalization ratios.

Q. No, no. I don't want you to misunderstand the question. I wasn't referring to the capitalization ratio. To the total capitalization.

A. Obviously, if you put in more assets, you have a different capital.

[fol. 454-210] Q. And who made the determination as to what assets would be transferred under the El Paso plan?

A. I think the Supreme Court did. And then we added to it.

Q. Did any outside financial advisors consult with you on that matter?

A. You're talking about the properties?

Q. Yes, sir.

A. No, sir, unless you take this into account—

Q. I'm satisfied with the answer, Mr. Boyd. I don't mean to press you.

A. I want to make sure I answer you fully. We put together the plan that has been submitted to the Court; and we had to consult with the security holders that we have testified to, in considerable length. And they had to be satisfied that the bonds that they were going to be taking were good and soundly protected. And they also to be satisfied that the divestiture effected would leave El Paso's bonds in sound position. So that we did contact many financial institutions who looked at the separation of properties, the estimated earnings, the capitalization ratios, and concluded that based upon that they were justified in transferring $180 million worth of debt from El Paso to New Company. So in that respect, of course, we did consult with many financial institutions.

Q. Well, these financial institutions were your creditors [fol. 454-211] you're referring to now?

A. And they will be the creditors of New Company, as well.

Q. I'd like to refer to some testimony that you gave this morning. It was my understanding that you testified that from January 1, 1957, the stock acquisition date, that New Company has—strike "New Company"—that Pacific Northwest has received an additional three trillion cubic feet of gas reserves.

A. Let me—

Q. Is that correct?

A. No, I didn't testify to that. I testified that we propose to transfer to New Company gas reserves that have been acquired from 1/1/57 to date in the approximate amount of three trillion cubic feet. That is reserves that Pacific Northwest did not have at the time of the stock acquisition on 1/1/57.

The Court: I thought that was a little different.

The Witness: I gave still another figure, your Honor—

The Court: 1.3 trillion, and 1.7 trillion, to equal three trillion.

The Witness: That is correct.

The Court: I heard some testimony to that effect. Now, I thought the 1.3 trillion—or maybe it was the other way about—well, what was it?

The Witness: If you'll let me restate it. During the [fol. 454-212] period that we're talking about from 1/1/57 to current date, there has been consumed on the Northwest division 1.3 trillion. During that same period, we have acquired in that area and propose to transfer to New Company three trillion. Thus, when you subtract 1.3 trillion from three trillion, you end up with 1.7 trillion, which represents the amount of gas in excess of what Pacific Northwest had at the time of stock acquisition.

The Court: Well, that's the way I understood it this morning.

By Mr. Lipson:

Q. The three trillion of gas that you refer to, was that acquired in Pacific Northwest's name or in El Paso's name or a combination of the two?

A. I think it would be in a combination of the two, because you're talking about a period when Pacific Northwest was a separate corporate entity, and you're also talking about a period during the merger. I'm sure it's a combination, because the Kings Gate gas, for example, was contracted for in the name of Pacific Northwest.

Q. When was that?

A. When was the contract signed?

Q. When was it contracted for?

A. The contract was signed May 27, 1957.

Q. Now, with respect to the three trillion that you acquired, could you illustrate where on the line this three trillion was acquired?

[fol. 454-213] A. Well, I could give it—I can give it to you this way, approximately. The Kings Gate gas represents approximately a trillion. I cannot give you the breakdown—

Q. That's Canadian gas?

A. That's right, that's right. I can't give you—and, of course, the balance of it was principally in the San Juan Basin, although there was some acquisition—I mean, the majority of the balance was in the Rocky Mountain area. Principally, the Big Piney field. And the balance of it, which was not particularly large, was in the San Juan Basin.

Q. The San Juan addition was—well, as you say, not particularly large. In general, Mr. Boyd, is El Paso prepared to modify its plan in order to transfer to New Company any additional quantities of reserves?

A. I think His Honor is going to—

Mr. Harrison: May I get the question, please?

The Court: He asked whether you fellows are ready to turn over some additional reserves.

Mr. Harrison: No, we are not, your Honor.

The Court: Well, your witness said it was up to the Court.

Mr. Harrison: Well, it is, your Honor, but I'm only reserving the right—the typical resistance.

By Mr. Lipson:

Q. In general, Mr. Boyd the computation of a reserve [fol. 454-214] life index is just a mathematical equation, is that correct?

A. A reserve life index?

Q. A reserve life index. Not deliverability life. Reserve life index.

A. I'll state again what it is.

Q. It's described in your divestiture plan.

The Court: Let's have him state it.

The Witness: With a reserve life index, you calculate the total quantity of reserves available to you; and you divide that by the quantity of production, or the quantity of sales, quantity that was consumed, in the preceding year.

By Mr. Lipson:

Q. And if in the preceding year, using New Company as an example, it had an additional production of 250,000 Mcf, its reserve life index would decrease somewhat?

A. Yes.

Q. Substantially, probably?

A. It depends on how much addition you're talking about. If it's a small addition, it's a small reduction. If it's a large addition, it's a large reduction.

Q. Well, 250 million is a large or small addition in your—

A. These things are all relative, Mr. Lipson. You have to talk about the—in what relation that is to the balance of your production and sales.

[fol. 454-215] Q. Well, in relation to the New Company's position, would that be substantial?

A. You can make a calculation. All of those figures are there, and you could make the calculation. Just add in 250 million, multiply by 365, add that to the figure that you see there, and divide it into what I think is 7.57 trillion. Isn't that it?

Q. You're close. 7.59.

A. All right. And you'll have it.

Q Have you done that, made that?

A. No.

The Court: For goodness sake, it's all in the record.

Mr. Lipson: Yes, sir.

By Mr. Lipson:

Q. Similarly, with an increased production of 250,000 Mcf, New Company's deliverability life would decrease from fourteen years, would it not?

A. You mean if you crank into the projected sales additional sales of 250 million?

Q. That's right.

A. It's a mathematical truism, Mr. Lipson.

Q. Is there any way of determining that mathematically?

A. Yes.

Q. Could you give us the formula so that we could use it and make the computation ourselves?

[fol. 454-216] A. Well, maybe I spoke too readily. You'd better let me talk to my petroleum reserve engineer. I don't know whether it takes more than a mathematical calculation. I'll have to find that out.

Q. In any event, would New Company be able to support the same fourteen-year deliverability life with an increased requirement of 250,000 Mcf?

A. No.

Q. Mr. Boyd, do you have a copy of the divestiture plan, Defendant's Exhibit A?

A. Yes.

Q. Would you refer to it, please, to Tab No. 7? That's the New Company's Summary of Dedicated Reserve and B. T. U. Now, that provides, does it not, that New Company's reserves as of the date thereon will be 7.592 trillion cubic feet?

A. That's correct.

Q. And it also provides that as part of this total, New Company will obtain 2,518 billion cubic feet from the San Juan system; is that correct?

A. That is correct.

Mr. Lipson: Your Honor, I would just like to draw the Court's attention to a document that is already in evidence in this case, Government's Exhibit No. 2 in the trial of the merits. It's the Annual Report of Pacific Northwest Pipeline Corporation. And I would just like to refer to the information on page 5 of that document and quote it.

[fol. 454-217] "Gas reserves dedicated to Pacific on December 31, 1957, aggregate 8,470 billion cubic feet, classified as follows."

Under "San Juan Basin," "Leasehold, 3,511. Contract, 1,036." Under "Northern Division (Contract): "1,595." And under "Canadian (Contract)": "2,323. Total, 8,470."

The Witness: I might say, Mr. Lipson, you're comparing apples and oranges.

By Mr. Lipson:

Q. The Annual Report for Pacific Northwest Pipeline Corporation, if I may show you the annual report, went out under the signature of Mr. Paul Kayser, Chairman of the Board, did it not?

A. If it so indicates, that's correct.

Mr. Harrison: We'll stipulate that if it is given to the witness and he examines it, it's all right.

By Mr. Lipson:

Q. Will the El Paso divestiture plan as it's presently constructed have any provision in it to allow New Company an independent look at the reserve picture and an opportunity to apply for additional reserves?

A. You'll have to give me that again.

The Court: Read it.

(Question read.)

The Court: Well, as it's presently constructed. Either [fol. 454-218] it does or it doesn't. You can find out by examining the document.

Mr. Lipson: Yes, your Honor, except that as with the trust agreement, I don't think everything connected with the plan is present in the document; and I'd just like to make sure that—

The Court: Well, then, we're back where we were yesterday afternoon. On the trust instrument, it was understood by the close of business yesterday that a separate trust instrument, separate from the decree, was contemplated. And that which it got out of it was necessary. Of course, we're going to pass on that.

Now, the divestiture decree with respect to the matter you're now inquiring about will either cover it or it won't, dependent upon the result of the argument you folks are going to address to me.

There doesn't seem to me to be any problem in examining a witness about something that isn't in the proposal. That's their proposal. Admittedly, it is in some particulars outlined.

I suppose you folks may be asking me to put something in the decree; and maybe the other side will. Now, maybe the Court will have some suggestions of his own, and this is something we're going to have to beat out over the anvil.

Your arguments will be addressed to those things. I [fol. 454-219] don't believe there's any point in asking Mr. Boyd, or asking Mr. Kayser yesterday, the same kind of question. We got into trouble about it.

Well, we're going to look into this whole thing. We're going to be here quite a spell. Better bring your wife out.

Mr. Lipson: Thank you, your Honor.

By Mr. Lipson:

Q. Mr. Boyd, still with reference to Defendant's Exhibit A, the El Paso divestiture plan, would you refer to Tab No. 3?

A. Yes, sir.

Q. Now, that's headed the Sumas Exchange Agreement. And I believe you've already testified as to the nature of the Sumas Exchange?

A. I have.

Q. Now, was this same Sumas Exchange Agreement contained in Tab No. 3 in effect on December 31, 1959, the merger date?

A. Yes, sir.

Q. There have been no changes to that exhibit—to that contract?

A. No. This is identical with that.

Q. Would you refer to Tab No. 4, the San Juan Gathering Agreement. Now, you've given some testimony with respect to the San Juan Gathering Agreement. And I won't ask you to repeat it. But except for the item of increasing the gathering charge from 1.375 cents per Mcf [fol. 454-220] to 4.5 cents per Mcf, are there any other changes incorporated in this agreement that were not present at the merger date?

A. Yes. Very material.

Q. Would you describe the nature of these other changes?

A. The vastly greater area in which the gas will be gathered, the fact that there will be gathering from three formations instead of one formation, and the fact that the number of wells from which we will gather will be greatly enlarged, the most significant thing of course being that the additional wells are greatly distant from the main gathering trunk of New Company, thereby requiring a much greater transportation distance of the gas than was provided for in the initial contract.

Q. Mr. Boyd, are you familiar enough with this document to point out to me—oh. Referring to Article 4 of that contract, I see that there are certain exhibits A, B, C, and D referred to there.

A. That's correct.

Q. Do they describe the matters that you have just referred to?

A. Well, you see the draft that you have there in your hands, Mr. Lipson, doesn't have any exhibits attached to it, and for the reason that we would expect to make that exhibit current as of the time that New Company went into operation. Between now and then unquestionably there will be additional wells drilled, and it will be in the interest of New Company to have the gas gathered from the addi-
[fol. 454-221] tional wells. Thus, those exhibits should be prepared as of the time that New Company actually goes into operation.

Q. Well then, this contract as it stands at the moment is not ready for execution?

A. No, no. It's what we are proposing, and we would suggest to the Court that he recognize the wisdom of having means by which New Company can gather gas from all of its wells, in which event the exhibits are going to have to be prepared accordingly.

Q. Are there any other possible changes that will be made in this contract between this time and the date the contract goes into effect?

A. I'm not aware of any changes in words.

Q. Changes in any other respect?

A. Well, you—

Q. I'm not sure if you're qualifying your answer or not.

A. Well, I'm qualifying it to this extent, that this sets out a formula by which the price shall be arrived at. And when you apply current factors to that formula—or when you apply that formula to current factors—you produce something in excess of four and one-half cents.

Q. Is the formula itself subject to revision by the Federal Power Commission?

A. It is subject—all rates are subject to the continuing
[fol. 454-222] jurisdiction of the Federal Power Commission. That is correct. And this rate, likewise, would be subject to the continuing jurisdiction of the Federal Power Commission.

Q. Prior to the execution of the agreement?

Mr. Harrison: No.

The Court: No, no.

Mr. Lipson: I just wanted to make that point clear on the record.

The Court: Well, you can make that point very clear. We tried the other. We tried to get the Federal Power Commission inquiry. And then I was going to pass on the competitive thing. But that isn't the way to do it. So now we're going to pass on the competitive matter here. And that involves a divestiture decree. That decree will be coming down. And the Power Commission will exercise its jurisdiction as it sees fit, of course.

Mr. Lipson: I don't mean to interrupt your Honor.

The Court: You're not.

Mr. Lipson: Would you mark this exhibit?

The Court: Justice Harlan pointed out maybe there's some room for Congressional action in this type of thing. The Court has jurisdiction over the antitrust question. The Federal Power Commission has jurisdiction over the rates, regulations. And you get into a thing like we have here. We both have jurisdiction. The first go-around, we thought [fol. 454-223] the thing to do was let the Federal Power Commission look into it. That's the administrative body that has special experience and training and qualifications. The way it is now, the Court, which hasn't any training or experience or qualification whatever about the rate inquiry, the functions of a regulatory body, has to deal with his function; and then we'll find out what happens over at the Federal Power Commission.

Maybe we ought to have a system where one or the other or somebody else would perform both functions, and we wouldn't have this monkey business about it. I tried my darndest to work with the Federal Power Commission, you know; and the Federal Power Commission did their darndest to work with the Court. As a matter of fact, the chairman of the Federal Power Commission sent me a letter that's in the record in this case saying: "Judge, if you

would prefer to hear the antitrust features first, we'd be delighted to send you a half a dozen carloads of exhibits and documents and let you go at it."

I declined and said: "Why don't you go ahead?"

So they did. I stayed my hand here. But now it's got back here, and I'm going to do it now. I'm going to give you a decree of divestiture one of these days. And then we'll have the Federal Power Commission handle the regulatory thing, as is its duty. And I don't intend to go into any of those matters at all. I don't think I have to decide this [fol. 454-224] question.

My job is to take away from El Paso and give to New Company those assets, of whatever nature, and along with them, a debt, that will put New Company into substantially the same position as Pacific Northwest Pipeline was, plus improvements and additions to the properties that El Paso obtained in the merger. It's our job here, of course, to so separate those companies in a very realistic way that will create independent companies, one independent from the other, with no control by El Paso of the New Company. That probably summarizes what we're looking at here, and I think that covers it.

There's a lot of detail. The worst feature of this is the debt feature, about $900 million in debt, held by how many creditors I don't know, now owned by the combined organizations. Obviously, a creditor would rather have that obligation owed by El Paso. That's a company with experience, stable, large, well fixed.

This new company is a new venture, with no experience with that as yet. It has a sensitive area as to how much of the experience and know how which El Paso's people can be exercised in the New Company, enjoyed by the New Company. You're going to have to find a chief executive officer to run the New Company who is not being run by El Paso in any way, manner, or form. We're going to have to get a [fol. 454-225] board of directors over there that's wholly independent of El Paso. Then you're going to have to have a staff.

Now, the holders of those bonds and debentures are going to have to consent to the release of El Paso and, instead, the assumption of the obligation by New Company—and that's a real tough problem—with $900 million of debt in an industry of this sort.

Of course, that isn't the only problem. That's a very major one.

Now, I haven't given up hope that we can hammer out through negotiations some of these problems, so that we end this litigation. It seems to me to be nonsensical to have any further litigation. We all know what the standards are laid down by the decisions of the Supreme Court of the United States. And we know what El Paso's got. We can determine what improvements and additions were made to those assets. We can make a fair allocation of that indebtedness, and we can work out a means by which to keep control of New Company and its board of directors, executive officers, and manager, independent of El Paso.

Now, I think that can be done, and I think it can be done by negotiation. And I'm not going to haul off in any precipitous sort of way right off the cuff with any ambitious plan of the Court's, because I haven't any, and I doubt if [fol. 454-226] I shall ever need to have any, either. I think you can work this out, and I'm going to have a series of meetings with you folks looking towards that end. I'm going to get you together, and we're not going to try to do it all in one bite. This is a big job, and we ought to take it a little at a time. There are a lot of problems. We solve one at a time, and we ought to be able to reach agreement upon them one at a time. And when we get down to the really serious differences of opinion between you—I don't know anything about that—we will take those one at a time and see if we can't iron them out.

Now, that's the way businessmen work out all their tough problems. That's the way what now appears to be a pretty tremendous corporation, El Paso Natural Gas Corporation, was built—by negotiation and working together and co-

operation, with the aid of a lot of technical men that I see sitting around over here.

I think we can do this job, and when you get down to places where you can't agree and the Court can't get you to agree and we can't work it out by conciliation, then the Court will have to make some decisions. But it will be prepared to do that.

I'm saying these things this afternoon because I've been thinking about a modus operandi, a way to proceed from here. Maybe the thing to do is pretty soon—I'm not going [fol. 454-227] to hedge you off in any way from putting on your evidence—and we may understand after we get through now if something develops that you want to put some more evidence on, why, of course, you'll do it. And as we discuss these things, and there's still disagreement, you may want to put on some more evidence. But I think we ought to proceed, and pretty soon, by taking up one of these problems at a time. Break this big problem down into segments that we can handle. The first inquiry I'm going to put to you is what are the realms in which you have already reached agreement? Let's find what we have already agreed upon. And let's find out what problems there are that you have not been able to agree upon, and we'll start working on it.

Now, sometimes these things are handled by a whole series of what are called pretrial conferences. But it's pretty late for pretrial conferences. Pre-pre-pre-pre-pre-trials. You know, a dozen of those pre-pre-pre-trials. And a couple of dozen pre-trials. And a lot of post pre-trials.

What I'm talking about is holding some conferences right here, in the court room. I'll meet you any hour you want, and you can come in here and see where we have some agreement, and where we're in disagreement. Let's see if we can't hammer out a decree.

Of course, out of that pretty soon is going to come some differences. I don't know what they are, what the serious [fol. 454-228] ones are.

With businessmen of a high order, and lawyers, there are accountants, petroleum engineers, public utility regulation experts, representatives of the public regulatory bodies—all the best brains you can find in this type of thing—I'd be very much surprised if you couldn't find a solution to every one of them. I think your problem up to date is taking too big a bite all at once.

I have no trials in prospect. I'm free for any period of time that may be necessary to work this out. We're engaged in that process right now; and I just want you to know that I'll be discussing with you when we get this evidence closed, I'll be discussing with you how you think we should proceed, how best to proceed, and by what method. But we'll be proceeding in a general way along the lines I have outlined to you.

I think we can work this out. There aren't any unknown factors, really. You know what the law is, and I believe we know what the facts are, too, and they're pretty much in the record. And I don't believe anybody has got his neck broken in this situation yet, and I'm going to try to see to it that nobody does.

The Court doesn't need to just sit up here and keep his mouth shut, you know. I've never considered that to be the judicial function.

[fol. 454-229] I think we can guide a little. I'll get down there around the table with you and take a look at these things and discuss things with you and help you hammer them out. That's what we're going to do.

Go ahead.

Mr. Lipson: Thank you, your Honor.

By Mr. Lipson:

Q. Mr. Boyd, I show you a document marked Plaintiff's Exhibit No. 7 entitled, "El Paso Natural Gas Company Estimated Gathering Charges in San Juan Basin as Included in El Paso Exhibits in Docket No. CP 64-76, All Volumes in Mcf at 15.025 psia." Is this a tabulation prepared by El Paso Natural Gas Company?

A. It has all the appearance of having been prepared by El Paso. I don't know that I've ever seen it before.

Q. I direct your attention to the lines numbered 13, 14, 15, and 16. They purport to show, do they not, the charges to New Company for gathering gas in the San Juan Basin area for the years 1965, 1966, 1967, 1968, 1969, and 1970, do they not?

A. Yes, that's right.

Q. And the rate is 4.5 cent rate?

A. That's correct.

Q. There is also a statement of the annual volumes involved for each of the years and of the average daily volumes involved?

A. Yes, I see that.

[fol. 454-230] Q. And using those volume statements, we could arithmetically work out the charges at the 1.375 cent rate?

A. If that's what his Honor orders.

Q. Well, I'm just asking you whether anything in addition to that would be necessary in order to work out the 1.375 rate.

A. Having never examined this, your statement appears to be correct.

Q. I am just inquiring whether there's a missing factor that I'm not aware of.

A. Not that I'm aware of. It would seem to me that if you took the annual volume and multiplied it by the factor that you've mentioned, you'd get the result that you seek.

OFFER IN EVIDENCE

Mr. Lipson: I offer this document in evidence, your Honor, Plaintiff's No. 7.

Mr. Harrison: No objection.

The Court: Received.

(Document marked Plaintiff's Exhibit No. 7 for identification received in evidence.)

Mr. Lipson: Your Honor, I'd just like to draw your attention to a few figures on that document.

The Witness: Let me back up here a minute. I think the volumes that are referred to here are not the volumes that would be gathered for New Company, but—you'd better let me make some inquiry about that. I can't tell whether these are the volumes that are going to be gathered [fol. 454-231] for New Company or whether they're going to be the volumes that are gathered for El Paso.

(Here Mr. Lipson conferred with the witness briefly.)

The Witness: Your Honor, I just don't know enough about this exhibit, never having seen it before, enough to make any decision.

The Court: All right. "I don't know." That answers your question.

By Mr. Lipson:

Q. Could you make inquiry of the matters?

A. Yes, I'll be glad to make inquiry about it.

Q. And be available for testimony on the document?

A. Oh, yes.

Q. I refer your attention now, Mr. Boyd, to Tab No. 5 of the divestiture plan.

A. I have it.

Q. And that's entitled, "Interim Purchase and Sale Option." Is that document what's been referred to—this document relates, does it not, to the Kings Gate Gas?

A. That's correct.

Q. Was my understanding of the testimony correct, this document was not in itself in effect as of the merger date, December 31, 1959?

A. There was no document in effect as of the date of the merger.

Q. You testified yesterday at page 14 of the abbreviated [fol. 454-232] transcript that I have:

"So we then proposed on behalf of our subsidiary again that if Pacific Northwest could not absorb all of this 150 million cubic feet, then until its markets did develop to the

point where it could digest it, El Paso would take that gas off the hands of Pacific Northwest. The applications that were filed with the Federal Power Commission even contained some proposed contracts to give effect to what El Paso indicated a willingness to do. These were only proposed contracts. They were never executed, and as a matter of fact before the Federal Power Commission got around to acting on the application the Pacific Northwest was actually merged into El Paso."

Mr. Harrison: That isn't inconsistent with the witness's statement, and I move to strike it.

The Court: Well, what are you reading it for?

Mr. Lipson: Just as a foundation for further examination, your Honor.

The Court: Well, go ahead.

Mr. Lipson: Thank you.

By Mr. Lipson:

Q. I show you Government's Exhibit marked No. 8 entitled, "Rate Schedule X 5, Agreement Between El Paso Natural Gas Company and Pacific Northwest Pipeline Corporation," dated September 1, 1959, and ask you if you can identify—

[fol. 454-233] Mr. Harrison: Is that in evidence?

Mr. Lipson: No, I'm asking the witness to identify the document.

Mr. Harrison: Could I see it?

Mr. Lipson: I'm afraid I have but one copy of this document (showing to Mr. Harrison).

By Mr. Lipson:

Q. And ask you if that is the proposed contract referred to in your testimony that I just quoted.

A. I'll have to take a look at it, Mr. Lipson.

This recites that it's a rate schedule. We never had a rate schedule in effect. And it also recites that it's an

agreement between El Paso and Pacific Northwest dated September 1, 1959. We never had any agreement between El Paso and Pacific Northwest that was executed. What I suspect this is is an exhibit of some nature that was attached to our application indicating a willingness of what we were willing to do with respect to our wholly owned subsidiary.

Q. Would this be the proposed contract that you referred to?

A. Yes, although I think there were—there was a modification of the contract, and I don't know which one this is. Some place during the course of the proceedings the proposed contract was—there was a proposed amendment to the proposed contract.

Q. Do you have a way of determining whether this is the most recent document in that line?

[fol. 454-234] A. No. I cannot—I mean, I can find out for you if you would like me to.

Q. I would.

A. All right. Would you show it to Mr. Najaiko? He can start functioning on that right away.

Mr. Lipson: In the interim, your Honor, I'd like to offer this document as Plaintiff's Exhibit No. 8 in evidence.

Mr. Harrison: Well, it has been identified by the witness, but—

The Court: Well, we don't know which one it is. Well, why don't you wait until you get the—

Mr. Lipson: We're confident which one Mr. Boyd's investigation will determine it to be.

The Court: You already know?

Mr. Lipson: Yes, but I can't testify to it.

The Court: Nobody is asking you to. If you know what it is, why don't you ask him?

Mr. Lipson: I think that's the most recent one.

The Court: You think it is?

Mr. Lipson: I believe it is, your Honor, and I'd be pleased to substitute another if it turns out that I'm wrong.

The Court: Well, why don't you find out? Will you check that, please, for us? And I won't receive it until we find [fol. 454-235] out.

These are submitted before the Federal Power Commission, aren't they?

Mr. Lipson: Yes, your Honor.

The Court: There might be a whole raft of them.

By Mr. Lipson:

Q. Mr. Boyd, I'd like you to address your attention to the next contract in the series in your tab, an agreement relating to transportation of gas for Colorado Interstate. That is, I believe, Tab 6; is that correct?

A. Yes, sir.

Q. Was this a contract binding on Pacific Northwest Pipeline Corporation at the time it was merged into El Paso, or was a similar contract in existence?

A. Pacific Northwest had a similar obligation.

Q. Do you have the original contract at your disposal, the original obligation?

A. Yes, I think that we can dig it out. I don't know just where it is.

Q. Can you tell me in what manner this agreement differs from the original obligation?

The Court: I think we'd better get the original, and then we'll see.

By Mr. Lipson:

Q. Would you be able to—

A. Yes, I think so.

Mr. Lipson: One other thing, at this time, your Honor. [fol. 454-236] Previously in the examination of Mr. Rowe, Plaintiff's Exhibit No. 6 was identified in part. I would like to show it to Mr. Boyd and ask him whether this is a document prepared by El Paso Natural Gas Company.

Mr. Harrison: This is what exhibit?

Mr. Lipson: Plaintiff's Exhibit No. 6 for identification.

Mr. Harrison: This is one that Mr. Rowe produced?

Mr. Lipson: That's right. It had not been offered into evidence.

The Witness: Well, Mr. Lipson, if you say this is what we furnished to you, I wouldn't question it. You asked us for lots of information. So far as I know, we supplied all of it.

Mr. Lipson: Your Honor, I have just been informed that I may be remiss. I understand that this document has in fact been offered, but it's been received subject to objection by Mr. Harrison.

Mr. Harrison: Well, your Honor please, this document is a voluminous compilation. I don't know how many pages. All sorts of material in it, none of which have been identified or supported by any witness. And I object.

The Court: Well, it hasn't been received yet, has it?

Mr. Harrison: I didn't understand.

[fol. 454-237] The Court: Did you say it hasn't?

Mr. Lipson: Yes, I believe so, subject to objection by Mr. Harrison.

Mr. Harrison: Subject to my right to except. I submit there has not been a single factor in this document that's been identified by anybody.

The Court: I hate to have a record go on like this. Now, we've had two in the last couple of minutes. Here's one that I admitted subject to your opportunity to object; and the other one I declined to admit, subject to your checking it. That's a poor way to manage a record.

Mr. Harrison: Well, I changed my—

The Court: I think the better way is to exclude them until we're ready to admit them unconditionally.

Mr. Harrison: Well, I would submit to the Court that this document, even if admitted, would have a—

The Court: Well, I'm going to exclude this until we give you folks an opportunity to look at it. You haven't had that opportunity. I'm going to reverse my ruling, if that's what I did. If I said that I admitted it, I'm going to sustain

the objection to it at this point. It's out, and the other one is out until you get them properly identified, until we have counsel stipulate that they may come in. Then we know what we're doing with this witness.

[fol. 454-238] (Whereupon Exhibits 6 and 8 were stricken.)

Mr. Lipson: Your Honor, with that admonition, I'd like to go ahead and identify the document, if I may.

The Court: Surely.

By Mr. Lipson:

Q. Mr. Boyd, I show you a copy of a letter dated October 23, 1964, addressed to one Carson Glass, Esq. Would you identify Mr. Glass?

A. Yes, Mr. Glass is one of our counsel interested in this case. He's located in Washington, D. C.

Q. That letter requested certain information from Mr. Glass in connection with this case, did it not?

A. Yes. It looks like seven pages of single typed requests.

Q. All right. Plaintiff's Exhibit No. 6, is, as you stated, an El Paso document. It is a response to a letter dated October 23, 1964, from the United States Department of Justice, is it not?

Mr. Harrison: May I see what the documents are that you're identifying, counsel?

Mr. Lipson: I'm trying to identify No. 6.

Mr. Harrison: All right. But I'm trying to identify what you just identified.

I have before me a letter dated October 23 addressed to a Carson Glass, signed by Assistant Attorney General. I don't understand.

[fol. 454-239] Mr. Lipson: Your Honor, the information contained in Plaintiff's Exhibit No. 6 are responses to questions that we propounded to the defendants. As a result of the last hearing, your Honor will recall that we were instructed to ask for any more information that we thought was necessary, and we did so by this letter. We asked quite a bit. This is a response to that letter.

Mr. Harrison: The response is not the response of the witness or anybody that has identified it. My objection is that I have no way of knowing whether there's anything true in this.

The Court: Who on behalf of El Paso handed it to you?

Mr. Lipson: Mr. Boyd or Mr. Kayser.

The Witness: I would not question the accuracy of the responses.

The Court: Well, we want to find out who representing El Paso turned it over to the Government.

The Witness: Well, I assumed responsibility for directions that it be turned over to the Government, your Honor.

The Court: All right. Does that satisfy you, Mr. Harrison?

Mr. Harrison: Your Honor, I'm still a little puzzled—

[fol. 454-239(a)] The Court: My goodness, these are your answers to their questions. Now, that's what they claim for it. And Mr. Boyd, the president of the company, says he assumes responsibility for telling whoever prepared them to turn them over to him.

All right. We'll receive it.

Mr. Lipson: Thank you, your Honor.

(Document marked Plaintiff's Exhibit No. 6 for identification was received in evidence.)

[fol. 454-240] Q. Mr. Boyd, since the date the Supreme Court decision came down in this case have you been approached by any other parties with proposals concerning the method of divestiture of New Company?

A. Yes, we have.

Q. Would you identify the parties.

A. If you want a complete list, I would rather check my files on that.

Mr. Harrison: I submit it is immaterial whether he has been approached or not, may it please the Court.

The Court: I don't know what you have in mind.

Mr. Lipson: Well, I think, your Honor, that it is incumbent on the Government to show that it does more than

merely oppose a plan that is presented before the court, but I think we have a duty to inform the court that there are other alternatives available that responsible, respectable third parties—

The Court: We have two or three sitting around the courtroom who have not the slightest financial or property interest in this lawsuit. They are here for one reason. They hope everything falls through so they will have an opportunity to buy something. If you are talking about that being an alternative, I must say I have a dim view of it.

Mr. Lipson: Your Honor, the—

The Court: Maybe your answer is going to be, "some [fol. 454-241] of those fellows." As a matter of fact, didn't you say your proposal was to let somebody else buy?

Mr. Lipson: No, your Honor, not entirely. We think that the El Paso plan is deficient—

The Court: You think what?

Mr. Lipson: We think that the El Paso plan is deficient for reasons we will explain to the Court.

The Court: Is what?

Mr. Lipson: Deficient for reasons we will explain to the Court.

The Court: We are going to examine all this.

Mr. Lipson: But I think if the Government stops at that point, it is doing less than what it is obligated to do.

The Court: Well, I will tell you what, Mr. Lipson: A long time hence, if it is necessary to take that time, we will let you suggest who else might be interested in doing something about an alternative plan. We are a long way from having failed at this point. So at this juncture I will sustain the objection.

By Mr. Lipson:

Q. Are you familiar, Mr. Boyd, with a company known as the Northwest Production Corporation?

A. Oh, yes.

Q. What is the relationship of Northwest Production to Pacific Northwest?

[fol. 454-242] A. Northwest Production Corporation was a corporation which Pacific Northwest owned, as I recall it, about 60 per cent of the common stock. The balance of the common stock of Pacific Northwest was held by the public. Now, when we acquired Pacific Northwest, we acquired, of course, the stock in Northwest Production.

Q. What does the El Paso plan provide with respect to Northwest Production?

A. We propose to transfer to New Company all of the shares of the stock of Northwest Production that we have in our possession.

Q. Well, does your plan propose as well a merger of the two entities?

A. That, of course, is going to be done after the New Company is launched and becomes operational. There are tax reasons why it is advantageous to do it that way. We would recommend that it be done, because there are advantages in so doing. If, of course, New Company concluded otherwise, why, they would be free to handle it otherwise.

Q. But there is no obligation to effect this merger under your plan, is that correct?

A. No.

Mr. Lipson: Your Honor, with the Court's permission, I would like to address myself to the matter of alternatives that may be available to the El Paso divestiture plan. I [fol. 454-243] would remark that the Government has carried on a substantial number of negotiations, as Mr. Boyd has noted previously, with El Paso over many months involving many meetings of many people. Unfortunately, we have not been able to reach an agreement.

At this stage, your Honor, to some extent we are aware of our position, and, as I mention, El Paso has formulated its proposal. We think that this would be the appropriate time when the Government could make known and available to his Honor the other alternatives that are available at this time, not excluding a change in the El Paso plan

itself, if that change would satisfy the Government. But, as your Honor pointed out, there are many people in this courtroom with great talent and great promise that can help the Court in many respects apart from the fact that there are self interests to be served. I will note there are self interests to be served on the part of many of those here, El Paso not excluded. I would merely request of the Court that this would be an appropriate instance to merely present to the Court the fact that there are these alternatives available and merely for the purpose of identifying and introducing these alternatives to your Honor, not requesting a decision at this moment. In that manner, perhaps your Honor would be materially assisted in reaching a decision.

The Court: I think it is premature. I have already in-
[fol. 454-244] dicated that, I thought.

Mr. Lipson: Your Honor, except for the additional information that we requested with respect to Government's Exhibit No. 8 from Mr. Boyd and with respect to Government's Exhibit No. 7 from Mr. Boyd, this concludes my cross-examination.

The Witness: Your Honor, may I inquire of Mr. Lipson if he has any further cross-examination of Mr. Kayser?

Mr. Lipson: Could I give you that answer a little later on this afternoon, Mr. Boyd?

The Court: Where is Mr. Kayser?

The Witness: He is not feeling well, your Honor.

The Court: Well, I thought he wasn't yesterday.

The Witness: Well, he will be here. He is most anxious that this case not be deferred, and it is just a matter of making arrangements for him to be here. He can easily be here tomorrow if Mr. Lipson feels he has need of cross-examination.

Redirect examination.

By Mr. Harrison:

Q. Mr. Boyd, in the course of your cross-examination there was read to you over the signature of Mr. Kayser an annual report of Pacific Northwest Pipeline, or an excerpt therefrom, referring to a billion cubic feet of gas reserve dedicated to Pacific on December 31, 1957, and you referred [fol. 454-245] to apples and oranges. Will you explain your statement.

A. Yes, sir. There are several methods by which gas reserves may be evaluated. One is known as a pressure decline method. And, without going into exactly what it is, let me say that it cannot be employed until there has been an appreciable amount of production from the reserve, from the reservoir. Prior to that time you have to resort to alternative methods of evaluating reserves. One such method is known as the volumetric method, or I think it also has another name, the "pore" method—(spelling) p-o-r-e.

El Paso was responsible in large measure for the exploration and development of San Juan Basin. Although there had been some wells of small consequence that were producing for many, many years, there had never been any substantial quantities of gas taken out of the basin; and, consequently, it was inappropriate to use the pressure production decline method. We resorted to the volumetric method of evaluating reserves. Other people did likewise. And let me say that the evaluation of the reserves shown on this sheet that you have just handed me was made on the basis of the volumetric evaluation.

As we produced gas from the San Juan Basin and relied upon those reserves and other reserves in certificate applications to the Federal Power Commission, the staff of the Federal Power Commission questioned the validity of [fol. 454-246] estimates based upon the volumetric method and recommended that a pressure production decline

method be employed, contending that when such method was employed you would obtain a substantially lower estimate of reserves. Although we still feel that the volumetric method is a valid method of evaluating the reserves and that resort now to a pressure production decline method gives you only what we call as a "not less than" figure, we nevertheless shifted simply to be on the conservative side from the volumetric method to a production pressure decline method, which, in our opinion, shows that there is "not less than" these reserves. We think the volumetric method comes close to showing what the reserves are.

Now, when we evaluated the reserves in the San Juan Basin on the volumetric method, we got a much larger reserve. Thus this annual report of Pacific Northwest using that method shows a much larger reserve for Pacific Northwest in the San Juan Basin. By the same token in the same year when El Paso made its annual report El Paso likewise employed the volumetric method, and it came out with a much larger reserve attributable to it in the San Juan Basin.

When we changed the method of reporting and resorted to the production pressure decline method, there was a reduction in El Paso's estimate of reserves and a reduction also in the reported reserves of Pacific Northwest.

[fol. 454-247] The significant thing is that whatever gas was in the ground was in the ground, and we are transferring back the leases and contracts that we got.

Mr. Harrison: I have no further questions, your Honor.

Mr. Lipson: With the Court's indulgence, may I resume cross-examination on Mr. Boyd that I did omit inadvertently?

The Court: Yes. It is time for recess anyway. See you in the morning at ten.

(Whereupon a recess was taken until the following morning, December 4, 1964, at 10:00 a.m.)

* * * * *

[fol. 454-248]

Transcript of Proceedings—December 4, 1964

10:00 a.m.

HOWARD BOYD, resumed the witness stand and testified further as follows:

Cross examination (cont.).

By Mr. Lipson:

Mr. Harrison: If I understood, you wished to examine the witness further.

By Mr. Lipson:

Q. Mr. Boyd, in the course of your testimony you went into the various costs of different sources of gas that were available to New Company. You discussed the Kings Gate gas, as I recall, and the cost figure of Kings Gate gas delivered into the New Company system in the state of Washington at the current volumes as about 29 cents per Mcf; is that correct?

A. No. I don't recall giving such testimony.

Q. Do you have any information as to the cost of Kings Gate gas?

A. Yes, Kings Gate gas at the Canadian border is running between 25 and 26 cents. That's on a cost of service formula, and thus the larger the quantity of gas delivered the lower is the unit cost. Now, Pacific Gas & Electric Company has just recently made application to the Alberta Oil & Gas Conservation Commission for the export of an additional 200 million cubic feet of natural gas. The Alberta board has already authorized that export. Now, the matter must go to the National Energy Board of Canada, and an application has been made by Pacific Gas & Electric [fol. 454-249] Company to the National Energy Board for the export of an additional 200 million cubic feet of gas.

out of Canada, which will come out of Alberta and will flow through the same line through which our Kings Gate gas flows. Thus, if the certificate is granted—

Q. Mr. Boyd, I really don't intend to cut you off, but I was just interested in the price.

A. This goes right to the price, Mr. Lipson, right to the price. If that 200 million starts to flow through those facilities, the present price that's now running between 25 and 26 cents will come down.

Q. Now, with respect to the Rocky Mountain sources of gas, do you have any information as to the approximate cost at the well head of the Rocky Mountain sources?

A. Yes. The Federal Power Commission has approved prices. It's an odd price, Mr. Lipson. It's fifteen point, and then there's an odd fraction, and I can't quote you the fraction.

Q. Cents per Mcf?

A. That's right.

Q. Fifteen and some odd cents per Mcf?

A. Yes. And by the way, you understand of course in connection with the gas that you asked about at Kings Gate, that is not a well head price. That's high pressure pipeline gas delivered all at one point.

Q. Would there be any additional gathering charges for [fol. 454-250] this Rocky Mountain gas you spoke of?

A. Oh, yes, of course.

Q. Do you have any information as to what the gathered price of this gas would be at the Rocky Mountain?

A. No, I do not have. But obviously, gas at the well head has to be gathered, has to be processed. If it has impurities in it, the impurities have to be knocked out. If liquids are present, the liquids have to be knocked out. As I did testify before at the previous session on October 19, one of the reasons that El Paso built the Opal Plant at a cost of $9.5 million was because Pacific Northwest did not have the financial ability to build that plant; and that plant had to be built in order to knock the liquids out of the gas which was produced in the Big Piney area, because

absent the removal of those liquids you've got into operational difficulties that made it impractical to move the gas.

Q. Well then, gathered and processed gas would be somewhat in excess of the fifteen cent figure?

A. Definitely so.

Q. Now, with respect to San Juan gas, is my recollection correct that gathered San Juan gas would be 18½ cents at the well head?

A. Well, the present well head price of San Juan gas is about 14½ cents. You have to gather that. We cannot gather it for four and a half cents. The present gathering cost to us today is 6.25 cents. So that gathered San Juan [fol. 454-251] gas today is costing us 14 cents at the well head about—yes. Six and a quarter cents to gather. So you're talking about San Juan gas that we buy from others is costing us gathered about 20¼ cents. Now then, it has to be processed.

Q. Would the gathering charges in the Rocky Mountain area tend to be higher than the San Juan?

A. No, they would tend to be lower. Your gathering costs are directly related to the deliverability of the wells, the ruggedness of the terrain, and the geographical separation of the wells. As I think I have previously testified, the deliverability of the San Juan wells is very low. Although there are huge quantities of gas there, the formation is what we call "tight," extremely tight. So that they give up the gas very slowly. If you need a large quantity of gas, you have to drill many wells. And thus, for a given million cubic feet or ten million cubic feet of gas, you have more wells, more gathering lines, and of course the San Juan Basin area is just about as rugged as any area in the United States. So that your gathering costs in the San Juan area are quite high.

Q. Now, of these three sources of gas, the Canadian source that we discussed, the Rocky Mountain source, and the San Juan, the most expensive to deliver to the New Company's Northwest markets would be the San Juan gas; is that correct?

A. Well, you can't be just categorical about these things, Mr. Lipson. Obviously, the cheapest gas to be delivered [fol. 454-252] right in the Pacific Northwest area is the Canadian gas. If I may, your Honor, just step down here to the blackboard. This gas that I'm pointing to that comes in at Sumas is purchased at 22 cents an Mcf. Now, if it's going to be consumed right there, obviously that's the cheapest gas that you could possibly have. There is no way by which you could move gas from San Juan up to that area and—

Q. The Puget Sound area?

A. Yes. And get it up there for 22 cents. So, too, the gas that's coming in at Kings Gate now costing between 25 and 26 cents, if it's to be used in this general area, it's far cheaper than Rocky Mountain gas. You can't move Rocky Mountain gas up there for that price.

Q. Into the Spokane area?

A. Yes, into the Spokane area. And I don't think you can move it up into the area of Seattle, even though this costs you 25 to 26 cents here, and the well head price is 15 plus here (indicating).

Q. "Here" is where—

A. "Here" meaning Big Piney. I'm sorry. When you add the cost of gathering the Big Piney gas, processing the Big Piney gas, and then moving it hundreds of miles necessary to get it up to Seattle, I seriously question whether even the Rocky Mountain gas is as cheap as the Kings Gate gas.

Now, as you come down the line here, and you get down [fol. 454-253] into San Juan, true, the well head price is 14 cents. But when you add the gathering cost to that of 6.25 cents, and then if you're going to try to market it up here in the area of Seattle and Portland, the cost of moving it these many hundreds of miles—and it's over a thousand miles—is going to make this more expensive gas than either Kings Gate gas or Sumas gas.

Q. Then, the transportation cost is at least of equal weight as the initial well head price of the gas in determining—

A. Well, to the customer himself the transportation cost is far greater. Just to give you a little illustration, in the little community that I live in the East, I think we pay something like $1.25 an Mcf delivered to my home. But that gas probably is purchased at the well head in Louisiana for somewhere around 15, 20 cents.

Q. Now, considering the Kings Gate Canadian gas, the Rocky Mountain gas you were referring to before, and the San Juan gas, the San Juan gas as a matter of fact is geographically closest to the Southern California market, is it not?

A. That is correct.

Q. What question with respect to the tax loss carryover that El Paso acquired from Pacific Northwest—did El Paso use that entire—or was El Paso able to make use of that entire tax loss carryover?

A. The tax loss, as the name implies, occurs because the [fol. 454-254] company was not making taxable profits.

Q. I'm just inquiring as to whether it was used by El Paso.

A. It did not go down the drain, if that's what you mean.

Q. Is there something left over of that? Or has it been totally used by El Paso?

A. No, it was not.

Q. Was it—

A. Are you talking about El Paso as a southern division? Bear in mind, the loss was used after there was a merger.

Q. I understand that.

A. Now, after the merger, you had both northern divisions and southern divisions that were combined. And one return, a consolidated return, was filed. Now, no portion of the tax loss went down the drain.

Q. Well, that's all I was inquiring, that the merged company was able to use the tax loss?

A. It did.

Q. At the end of yesterday's session there was some question remaining about whether or not Plaintiff's Ex-

hibit No. 8 was the most recent of the series of the tariffs. Have you been able to make—

A. Yes. You say it is most recent. Of course, you're talking about a period of time back in—what? 1957?

Q. '59, I believe.

A. '59, yes. In other words, there were two exhibits, and [fol. 454-255] antedated the other by a few months, and this is the one that was filed later. It was the later of the two, back in '59.

Mr. Lipson: I take it then there's no objection to Plaintiff's Exhibit No. 8?

Mr. Harrison: No.

OFFERS IN EVIDENCE

Mr. Lipson: To make the record on the point, your Honor, I'd like to offer it again.

The Court: Received.

(Document marked Plaintiff's Exhibit No. 8 for identification received in evidence.)

By Mr. Lipson:

Q. Mr. Boyd, if I may interject a comment, I lost quite a bit of sleep trying to figure the source of the three billion cubic feet of gas that you referred to in your testimony yesterday.

Did any part of this three billion cubic feet of gas originate in connection with the Sumas contract?

A. No, sir.

Q. Now, you stated that a small amount came from San Juan and Canadian reserves, or principally those associated with the Kingsgate contract.

A. That is correct.

Q. The remainder—

A. I beg your pardon. I wasn't following that too closely. Would you restate that or may I have the last question, please.

(Question read.)

[fol. 454-256] A. What I wanted to correct or make sure was clear: There was also a large quantity acquired in the Big Piney area.

Q. That's what I was just getting to.

A. Yes.

Q. The remainder then would tend to be the Big Piney area?

A. The Big Piney area, that is correct.

Q. Was this acquired by leasehold or by contract?

A. By contract.

Q. And what was the date of the contract negotiations?

A. It was with Belco Petroleum. And if I may refer to Mr. Najaiko, he can give me the exact date when that was.

Mr. Najaiko: December 11, 1960.

The Court: What was the date?

Mr. Najaiko: December 11, 1960.

The Court: December 11, 1960.

By Mr. Lipson:

Q. Would you point out in Government Exhibit No. 3, the contract you referred to?

A. This was prepared at my request. Mr. Derrick can probably point it out for me, or Mr. Najaiko. It will be in there.

Mr. Harrison: What is this exhibit?

Mr. Lipson: It is Government's Exhibit No. 3.

Mr. Harrison: Well, I would think if the witness can't testify to it and Mr. Derrick can, you ought to get Mr. Derrick.

Mr. Lipson: I would ask, your Honor, that the reference [fol. 454-257] to the three billion cubic feet be stricken from this witness' testimony.

The Court: No, we are not going to strike it from this witness' testimony.

Mr. Lipson: What we are trying to do is to determine the source of this gas.

The Court: If you want to, we can let Mr. Boyd step down for a minute and you can get that small item from somebody else and you can proceed. We don't need to strike anything now.

Mr. Lipson: I would be glad to proceed in that manner, your Honor.

The Court: All right. Will you please step down.

Mr. Lipson: Your Honor, I am informed that I used the word "billion" when I was referring to three trillion cubic feet, and I would like the record to be clear on that point.

The Witness: If your Honor please, I am informed that we do not have a contract in the courtroom. It is thought to be over in our office here in Salt Lake. We will get the contract itself, if your Honor please.

The Court: Now, is there anything else that you need from anybody here? If not, you take the stand again.

Mr. Lipson: Your Honor, in order to prevent an errand being done twice, what I am particularly interested in is [fol. 454-258] finding out where in Government's Exhibit No. 3 there is reference to that contract as well.

Mr. Harrison: Will it help you if we read it? I don't understand the special significance of Government's Exhibit No. 3. If counsel wants to find out where the reserves came from—

The Court: Well, Mr. Harrison, I am going to let the Government proceed in this way and make what inquiries they want to. I don't know either, but the only way we are going to find out is to let him tell us.

By Mr. Lipson:

Q. Would it be possible for you to get that information?

A. Yes.

The Court: Has the man left?

Mr. Derrick: I will get it.

By Mr. Lipson:

Q. Mr. Boyd, would it be possible for you to supply to the Government a breakdown indicating the sources of these blocks of gas in the Rocky Mountain area, the blocks of gas that we are referring to in this discussion?

A. Well, now, Mr. Lipson, you asked us to supply you with data showing every piece of gas that had been acquired since 1/1/57. The area in which it had been acquired, the amount of gas attributable to it, the price applicable to it, and we responded in an elaborate exhibit, making reference to thousands—at least a thousand contracts. Those refer to the different areas included in there [fol. 454-259] as Big Piney—I mean—yes, the Big Piney area. Now, what, in addition to that, are you now asking for?

Q. Mr. Boyd, the exhibit you are referring to is Plaintiff's Exhibit No. 3, is it not?

A. Yes, that's correct.

Q. And that completely identifies all the gas that we are talking of, does it?

A. I don't know what you are talking about.

Q. The three trillion cubic feet.

A. I don't know. We are going to ask Mr. Derrick about that. That is what he is going out to check on right now.

Mr. Lipson: Your Honor, if the Court feels an explanation is in order, I would just like to explain that we would like to find out the source of the three trillion cubic feet that Mr. Boyd has testified to. An examination of Plaintiff's Exhibit No. 3, which lists the various contracts, fails to disclose to our eyes the source of all these quantities of gas, and if there are other contracts or other leaseholds identifying the source of this gas, we would like to obtain it. If Government's Exhibit No. 3 is complete in that regard, then obviously we don't have any more to ask for. We just want to get the complete information as to what was represented by this three trillion cubic feet.

By Mr. Lipson:

Q. Mr. Boyd, do you have a copy of your own divestiture [fol. 454-260] plan—

A. Yes.

Q. (Continuing) —available?

A. Yes.

Q. Would you turn to the balance sheet. I believe that is Tab 11.

A. I have it.

Q. Would you refer on the left-hand side of the balance sheet, under the heading, "Deferred Debit," to the first item, "Excess Cost of Investment in Former Subsidiary over Book Value, $2,535,091." Do you have that, sir?

A. Yes.

Q. Would you explain what that account represents?

A. I think I know, but I would rather not guess about it. Let me confirm my impression and after the next recess, or later in the morning, I will give it to you exactly.

Mr. Lipson: That will be perfectly satisfactory to the Government, your Honor.

By Mr. Lipson:

Q. At the conclusion of yesterday's testimony there was a question left open as to the effect on New Company's deliverability life of an increased 250,000 Mcf increment, and you stated at that time that you would consult with your—I guess petroleum engineers.

A. Yes. And I find that it would take an elaborate calculation to come up with the answer.

[fol. 454-261] Q. Would it be unduly burdensome on you if I asked you to make that calculation, sir?

Mr. Harrison: This is with respect to El Paso?

Mr. Lipson: Yes. Not Mr. Boyd on the stand at the moment, your Honor, but El Paso.

Mr. Harrison: This is El Paso with the New Company divestiture?

Mr. Lipson: No. Let me make my question clear. I am referring to a calculation made by El Paso of New Company's deliverability life based on a 250,000 Mcf increment.

The Court: Now, what is it you want to know about that?

Mr. Lipson: I would like to know what effect that would have on New Company's deliverability life. Mr. Boyd stated that it would take an elaborate calculation, and I am merely inquiring whether he would be willing to have the calculation performed.

The Court: Well, I am not following you. What effect would what have on New Company's deliverability life?

Mr. Lipson: An increment of 250 Mcf of gas, your Honor. That figure we have used is the same figure that El Paso is proposing on its behalf to deliver to the California market.

Mr. Harrison: I don't understand what an increment of 250 million is, your Honor. Does that mean 250 million under service contract for 20 years?

[fol. 454-262] The Court: Let me ask the witness a question. Do you understand what he is talking about?

The Witness: Well, I understand the assumption, your Honor, that he is making.

Mr. Harrison: Well, I would like to hear what it is from the witness, your Honor.

The Court: All right, tell us.

The Witness: Well, he wants to know what the deliverability life of New Company would be if you suppose that New Company were to commence immediately to deliver 250 million cubic feet of gas to California.

The Court: Is that right?

Mr. Lipson: That is correct, your Honor.

The Court: All right. Well, now, how much trouble is it going to be to give him the answer to that?

The Witness: There again I will have to ask Mr. Derrick. He is the man who has left the courtroom.

The Court: All right. We will let you know after the next recess.

Mr. Lipson: Thank you, your Honor.

By Mr. Lipson:

Q. Mr. Boyd, have you had an opportunity to examine Plaintiff's Exhibit No. 3? I understand from the transcript of yesterday's proceeding that you had some question about it. Are you satisfied in your mind that the charge—that it is an El Paso document?

[fol. 454-263] A. It is not an El Paso document. You indicated that this—well, I say—what confused me was the statement that this was taken from an exhibit filed by us in Docket No. CP 64-76. That is not the source of it. But my inquiry did develop that we had prepared this document, and I have every reason to believe that the information thereon is accurate.

Mr. Lipson: In order to clarify any possible confusion in the record, your Honor, I would like to offer the document. Do you have any objection, Mr. Harrison?

Mr. Harrison: No.

The Court: Received.

(The document marked Plaintiff's Exhibit No. 7 for identification was received in evidence.)

Mr. Lipson: Your Honor, I would just like to apprise the Court of some figures on this document. The gathering charges in the San Juan Basin, El Paso charge to New Company, 1965, based on the four and a half cent gathering charge, would amount to $492,895. In 1966 it would amount to $592,463. In 1967 it would amount to $730,486. In 1968 it would amount to $853,552. In 1959 it would amount to $869,250. In 1960—I am sorry, in 1970, your Honor. Did I say "1959" before? I misspoke myself. I meant 1969. In 1970, $910,068.

Your Honor, I would like to make reference to the added four pages that El Paso submitted to the Government yesterday in correction of Plaintiff's Exhibit No. 3. In [fol. 454-264] general, these repeat similar pages that are already parts of the exhibit except that certain items are

stricken through, and I would like to inquire of Mr. Boyd as to the nature of these strike-outs and omissions.

By Mr. Lipson:

Q. Are you prepared—do you have—

A. Yes, I had some earlier. Let's see what happened to them. Here they are.

[fol. 454-265] Q. I draw your attention to the item under McLane and White. The original reserves referred to there amount to 200.4 M'cf. And I assume from the abbreviations that refers to Pictured Cliffs reserves?

A. Yes. I think that's correct.

Q. Now, that is stricken out. Will you explain the basis for the strike out?

A. Well, bear in mind in this exhibit, in this total exhibit, as I mentioned earlier, we list over a thousand gas acquisitions. Obviously, I do not carry in my head information with respect to particular items; but I can explain to you why these changes were made. You asked us by letter to furnish you with the identity of every piece of gas that we had acquired from 1/1/57 up to a relatively current date, indicating when we acquired it, how much reserves were attributable to it, where it was located, and the price of it. And we gave you exhibits listing over a thousand such items. That information was compiled and furnished to you in about ten days. It came from many sources in the company's organization.

On recheck to make sure that this compilation of over a thousand items was accurate, we found that there was need of correction in some instances. Now, what I have done is take the largest of these items, and they are typical of the other changes that were made. If you will direct your attention to the third item that is stricken on this page, [fol. 454-266] which, absent the striking, would indicate we had picked up during the period that we're talking about after stock acquisition, it would indicate that we had picked up 296,000 M'cf.

Q. What is that in cubic feet, sir?

A. Well, M is a thousand, and M² would be ten thousand. Now, that's a substantial item. And as indicated there, it would indicate that we had acquired that after the stock acquisition of Pacific Northwest. But when we went back and restudied our records, we found that we had an option to buy this gas, which option we had prior to the stock acquisition. We didn't exercise the option until after the stock acquisition. And therefore, that was listed as a piece of gas that we had acquired after the stock acquisition. But since we had an option executed prior to the stock acquisition, we thought that this should not be included in the volumes of gas acquired by us after stock acquisition. Now, there's another very substantial one on these four pages. If you turn to the third—

Q. Before you do that—

A. Yes.

Q. Just to make the record clear to the point, you were referring to the item under Texas National Petroleum Group?

A. Yes, that's right, Texas National Petroleum Group.

Q. And Work Order No.—

[fol. 454-267] A. No. 71,198. All right. Now, if you turn to page 3, the last item on that page entitled, "Superior Oil Company, Work Order 70,849," that would indicate as originally written that after the stock acquisition of Pacific Northwest, we acquired 61,219 M²cf. All right.

Q. More than that, sir, wouldn't it be?

A. What's that?

Q. I say, wouldn't it indicate more than that?

A. Well, I thought I read it correctly. 61,219 M²cf.

Q. Yes. But as I understand the makeup of this chart, you were only referring to the Dakota reserves? You weren't referring to the Mesa Verde and Picture Cliffs reserves?

A. Oh, yes. I think you're correct, yes. In other words, there was the quantity that I've just stated in the Dakota.

And also the quantity I've also indicated in the Picture Cliffs and Mesa Verde.

Now, in rechecking our records to find out whether or not this property should be listed as gas acquired by us after the stock acquisition, we found that prior to the stock acquisition we had a contract with Superior Oil Company to purchase this gas. So that the gas was committed to El Paso before stock acquisition. At a subsequent date, for business reasons that I'm not presently acquainted with, Superior Oil wanted to sell the leases. And so we bought the leases covering a reservoir as to which we already had a gas purchase contract.

[fol. 454-268] Thus, we think it's inappropriate to list on this sheet gas reserves acquired after stock acquisition, when in fact we had a contract for the purchase of the gas prior to stock acquisition. Now, that's characteristic and typical of the changes that are reflected in these several sheets.

Q. Now, except for the Superior Oil item that you just referred to, were all of the other items similar to the option arrangement?

A. I don't know whether they were options or whether they were contracts. But what I'm saying to you is that in each instance where we have stricken out an item it was because we had some claim to the gas prior to the time of stock acquisition.

Q. You had a string on the gas, so to speak?

A. That's right, we had a string on it.

Q. With respect to the options in each case in which there options, were the options exclusive to El Paso? That is, giving El Paso alone the right to exercise the option?

A. Oh, I'm sure that is correct.

Q. In each case was El Paso required to exercise the option by any predetermined date?

A. Well, I say in each case. All I'm saying to you, Mr. Lipson, is that by one fashion or another we had a string on these quantities of gas before stock acquisition. There-

[fol. 454-269] fore, we thought it was inappropriate to list it as gas acquired after stock acquisition.

Mr. Lipson: Your Honor, at this time I would merely like to observe that the witness' testimony is based on his interpretation of existing written legal agreements as to the nature of the options and so forth; and I submit that the documents would be far more appropriate to determine whether or not El Paso in fact had a string on these things.

The Court: You're asking the witness questions. You're presuming. If you don't want him to testify, quit asking him questions.

Mr. Lipson: I would ask that these corrections not be added to the existing Plaintiff's Exhibit No. 3.

Mr. Harrison: We will offer them in evidence, if your Honor please, as Exhibit for the defendant. They have been identified by the witness.

The Court: What is the identification number? No need to bring it up here. I don't want to see it. What's the number?

Mr. Lipson: The basic exhibit is Plaintiff's Exhibit No. 3.

The Court: I know. But what are we offering now?

Mr. Lipson: This has been awarded no number to my knowledge.

The Court: Well, let's have the clerk number it.

[fol. 454-270] (Defendant's Exhibit J was thereupon marked for identification.)

Mr. Lipson: Are you offering this, Mr. Harrison?

Mr. Harrison: Yes.

Mr. Lipson: I would object to it, your Honor, since it contains legal conclusions of the witness.

Mr. Harrison: I submit that counsel asked the questions. I wouldn't have asked for leading conclusions, but he—

Mr. Lipson: Well, I don't deny that there are legal conclusions in there. I say that it is objectionable because it contains these legal conclusions.

The Court: Objection overruled. Exhibit is received.

(Document marked Defendant's Exhibit J for identification was received in evidence.)

By Mr. Lipson:

Q. With respect, Mr. Boyd, to the options themselves, the contracts themselves, contained and relating to each of the strike outs in the four pages of Defendant's Exhibit J, could they be made available for examination by government counsel?

A. Yes. We'll make them available, but you have misstated what I testified to. You said, "with respect to the options regarding each one of the strike outs." I indicated to you that they were not options in all instances. For example, I

[fol. 454-271] considerable length about the Superior situation. That did not involve an option. We had a gas purchase contract. We were—we had a contract for the purchase of the gas. Now, for business reasons the gas purchase contract was converted into an acquisition of the leases themselves. It wasn't done pursuant to an option.

Q. In addition to the options, then, could the contract be made available?

A. Oh, sure. Whatever the instruments were, they can be made available.

Mr. Lipson: That's what I was requesting. I beg your Honor's indulgence.

Your Honor we have no further questions of the witness, Mr. Boyd, at this time, until the additional information that we have requested is made available. Therefore, I wouldn't—

The Court: All right.

Mr. Harrison: I'm a little bit left at a loss.

The Court: Well, he's going to want him back on the stand as soon as you get the exhibits that someone is going to look for.

Mr. Harrison: May I ask the witness and counsel what arrangements can be made, so that we can move the proceeding? Do we have these here, Mr. Boyd?

The Witness: Well, we've gone to see whether or not the [fol. 454-272] one contract is here in the Salt Lake City office. As soon as Mr. Derrick gets back, I'll ask him how long it will take him to make the calculation on this assumption that Mr. Lipson made.

Mr. Harrison: Mr. Lipson wishes to see certain documents. Are they available?

The Witness: Those would be documents in El Paso.

Mr. Harrison: That's the reason I bring up the question of procedures in El Paso.

Mr. Harrison: That's the reason I bring up the question of procedure of time.

The Court: Where are those documents?

Mr. Harrison: In El Paso, apparently.

The Court: Down in Texas?

The Witness: Yes, sir, down in Texas.

The Court: Do you want them, Mr. Lipson?

Mr. Lipson: Your Honor, I'd like to have an opportunity to take a look at them, if I may.

The Court: All right. Suppose you have them sent up here.

The Witness: We'll do that. Then there was just one other item. Mr. Lipson wanted me to explain what this item on the balance sheet was, and I can do that very quickly, if I may step down, your Honor.

The Court: All right.

[fol. 454-273] Mr. Harrison: We requested counsel for certain additional information—Exhibit D for the Defendant set forth the stock of—registration of shares of stock of the names of various brokers and nominees; and counsel has been kind enough to give me the information we requested on that. And we'll offer it in evidence as Exhibit K.

Mr. Lipson: May I object to that submission in evidence? Those are my personal notes, counsel's notes, of the material obtained. I'm glad to make the material available,

but I'd like to have it in some other form than counsel's notes.

The Court: I'm going to receive it in evidence, and you can substitute a form that you're speaking about. Show it to counsel first. We'll receive this now.

(Document marked Defendant's Exhibit K for identification was received in evidence.)

The Court: If you have something you'd rather have in place of it—

Mr. Harrison: We have nothing further, except what Mr. Derrick will bring in, in the matter under investigation by him.

The Court: Is there something you want to do? If not, we'll recess until that comes over.

Mr. Lipson: We have witnesses prepared to go on, your Honor.

[fol. 454-274] The Court: We'll, we're not ready yet for you. They're not ready to rest, I suppose? Suppose we recess a minute. How far is your office from here?

The Bailiff: Five blocks.

The Court: That's over at the corner of 2nd East—3rd East? All right. We'll recess.

(Recess had.)

[fol. 454-275] Mr. Harrison: If your Honor please, with regard to certain contracts which counsel asked the privilege of expecting, they are in El Paso, and, subject to the Court's approval, we have agreed that we will make them available to counsel and that the exhibits will be subject to check and correction if any corrections are necessary, at a later hearing.

The Court: All right. Now, what do you want to do at this juncture?

Mr. Lipson: Your Honor, the Government has some witnesses to put on, and we are prepared to offer the Court an opening statement as well.

The Court: I would like to have you give me an opening statement and tie together what it is you are going to produce. So you proceed in your own way.

OPENING STATEMENT BY MR. LIPSON ON BEHALF OF GOVERNMENT

Mr. Lipson: The background of this case, your Honor is, of course, based on the fact that April 6 of the past year the Supreme Court handed down an opinion holding that a Section 7 violation was established as a result of El Paso's acquisition of Pacific Northwest, and the Supreme Court thereupon ordered divestiture without delay.

On October 19 past, El Paso submitted to this Court its proposed plan of divestiture. The Government had been apprised of that plan a few days before. There had been a series of previous negotiations which Mr. Harrison has [fol. 454-276] already described in some detail.

Generally the Government and El Paso had been meeting to determine to what extent they could agree on proposals that would be incorporated in a divestiture program.

To some extent there was a meeting of the minds, but in many respects we were unable to reach agreement, and with respect to the October 19, 1964 plan, we have checked it out in as much detail as was possible in the intervening time since a plan of comparable detail had not been submitted to us previously, and we have adopted a position with respect to that plan.

Generally, that position is that we find it inadequate to meet the requirements of the Supreme Court mandate as we understand it.

I would like to refer generally to one of the real problems in this litigation, which your Honor has himself referred to, and that is that the merger of assets occurred in December of 1959, several years ago. In the intervening years there has been a certain amount of scrambling, which I suppose is inevitable in a situation like that. Part of

the difficult job that this Court has at this time is to unscramble them to the extent possible. In that respect the Government has certain suggestions to offer this Court in addition to the El Paso divestiture plan.

The second principal problem is that the interstate trans- [fol. 454-277] mission of natural gas is subject normally to regulation by the Federal Power Commission under the terms of the Natural Gas Act, and, while we realize and while we maintain that this Court has principal jurisdiction over the antitrust laws unquestionably, nevertheless to the extent that it is possible to do so the Government believes that an effort should be made to accommodate the jurisdiction of the Federal Power Commission under the Natural Gas Act with this Court's jurisdiction under the antitrust laws.

The Court: Well, that was what I had in mind when I granted the FPC petition for leave to appear as amicus, and I should certainly welcome that sort of thing. I think that is a very sensible thing to do, and I hope, as we go along, the representatives here of the Federal Power Commission will be prepared to participate toward that end. I suppose that is what you have in mind.

Mr. Lipson: That and in any other way that your Honor can determine to use the facilities of the Federal Power Commission and the jurisdiction of the Federal Power Commission.

The Court: I will be interested in your suggestions about that and the suggestions of the other side. Most certainly I should think we ought to anticipate the Federal Power Commission and accommodate this divestiture decree to their requirements as near as may be.

[fol. 454-278] Mr. Lipson: As to the El Paso plan of divestiture itself, we have given it thorough review, your Honor, and we have, I will say, reluctantly come to the conclusion that in our opinion it fails to offer appropriate relief to which the people are entitled. In review, it instead tends to perpetuate to some extent the very anti-competi-

tive effects that this litigation was instituted to prevent or undo.

As to the plan in specifics, let me refer first to the spin-off feature of the plan. Certainly from the antitrust viewpoint that probably is of paramount importance.

Let me observe first, your Honor, that perhaps the document that defendants have introduced as Defendants' Exhibit "H" in this case, "The Analysis of Stock List of El Paso Natural Gas Company, Record Date—November 16, 1964," may be the most significant document in this litigation so far as determining the efficacy of the spin-off as reestablishing competition.

The Court: Which document is that?

Mr. Lipson: This is Defendants' Exhibit "H", your Honor. The figures on that document state—

[fol. 454-279] The Court: Can you hand that to me from there on the desk? All right. Go ahead.

Mr. Lipson: The figures on that document indicate, your Honor, that of a total sum of shares of just under 23 million—exactly 22,938,369—10,399,775, or according to my rough calculations about 44 per cent of the total, are held by less than one per cent of the total number of shareholders of the El Paso Natural Gas Company. Only 1,625 stockholders out of a total of 117,500. It has been made clear from testimony already received on the record, your Honor, that the composition of the stockholders of New Company under the El Paso divestiture plan will mirror this situation, with the slight exception of the trust arrangement. And I refer to that separately, because the trust arrangement really only deals with a very few shareholders, those holding 115,000 approximately and more shares.

With respect to the bulk of the large, and we can assume active, accounts in the El Paso Natural Gas Company, these same accounts will be the large and active accounts under New Company.

We think that a community of interest, if you will, will be established under an arrangement of that nature that

will make it at best, your Honor, doubtful whether competition can be restored between the two companies. Given the assumption of an honorable and an independent man-
[fol. 454-280] agement dealer—and we'll assume that the management to be installed in the New Company is—we think it would expect more than human experience has led us to believe we can expect. If we would look to them and have them ignore the fact that in large proportion their stockholders are the same stockholders as the stockholders of El Paso.

We think that this will be an ever present probable detriment to competition; and as we view it, the principal job to be accomplished in a divestiture suit is to do the most that can reasonably be expected to establish a competitive framework in which the two companies can operate.

We believe that a plan can be devised by this court that will do substantially more than the arrangement proposed by the El Paso plan, specifically with respect to this spinoff.

There are other possibilities. Obviously, one of them is the sale to a third party group which at the outset is independent of El Paso.

I would like to state, your Honor, that we have not sponsored any particular third party group. There are obviously people interested in this thing who would have to qualify themselves on a variety of factors, and we don't propose at this time to enter into their specific qualifications.

Nevertheless, it should be noted that there are what appear to be at the outset reputable, experienced third party
[fol. 454-281] groups interested that are independent of El Paso at this time, interested in taking the pipeline over on a reasonable basis.

We are not, your Honor, unaware of the fact that there are security interests involved here, there are innocent shareholders involved here. We would propose no solution that would incorporate undue hardship to these persons.

Nevertheless, I believe that the appropriate kind of relief that would enforce the antitrust laws must take prece-

dence over possible burdens that would be borne by the security holders or by the shareholders themselves. We would never impose burdens unless there were a good reason for them. But the very structure of our society, as your Honor is undoubtedly aware, is based on the antitrust laws and based on a competitive situation existing in the American economy.

In general, we think that the El Paso spinoff plan fails to establish New Company as a corporation that will be completely independent of El Paso. We think that the plan will tend to establish a community of interest that may be maintained between the two companies through their being owned by substantially the same stockholders. And we maintain that even if El Paso itself as a separate corporate entity refrains from overt interference in New Company by appropriate injunctions, still it is unreasonable in our view to expect that the New Company's management, how-
[fol. 454-282] ever well intentioned they may be, will completely disregard the fact that they are subject to common ownership.

The other features of the El Paso plan deal less with the method of distribution, your Honor, than they deal with what is to be distributed. Obviously, if the New Company is to be established as a competitor, it must have, at start at least, a reasonable amount of assets to begin in business and offer and continue to serve markets and offer competition in the future.

In general, we take the position that the failure on the part of El Paso to allocate to New Company what we consider to be a fair share of the important San Juan Basin gas reserves that have been acquired by El Paso since the date of the stock acquisition and since the merger will deprive New Company of its fair share of gas that it would need in order to compete for additional markets, and particularly, your Honor, with reference to the California market.

I believe that it's been brought out in testimony already that of the various geographic places from which New Com-

pany can be expected to draw its gas reserves, probably the cheapest and certainly the closest to the southern California market would be the San Juan Basin area of northwest New Mexico.

The record, at trial, your Honor, establishes that Pacific Northwest was active in acquiring gas in that specific area prior to the date of the stock acquisition by El Paso. Gov-
[fol. 454-283] ernment Exhibit No. 3, we believe, shows that this gas acquisition program in the San Juan Basin tended to abruptly cease after El Paso acquired Pacific Northwest's stock January 1, 1957.

Nevertheless, substantial additional amounts of gas have been acquired in the San Juan Basin since the date of the stock acquisition. Indeed, as recently as 1962, if your Honor will recall from a portion of the annual report that I read, a substantial find was made in one of the geologic strata there known as the Dakota Reserves.

We believe that it's probable that had Pacific Northwest remained independent, it would have acquired a certain amount of gas in the San Juan Basin. It's to be recalled, your Honor, that when Pacific Northwest was originally certificated, it was certificated to serve the northwest area, based largely on sources of San Juan gas.

At that time a competing application was urging that the northwest area be served by Canadian gas; and at that time the Federal Power Commission acted in favor of a San Juan Basin reserves. Obviously, the San Juan Basin is a valuable gas reserve area. It's an area closest economically, certainly, to the California market; and the California market is in certain respects the key point of this litigation. This is the nearest and largest growing market that New Company can be expected to serve in the future.
[fol. 454-284] We think that New Company should be given some additional amount of reserves that would tend to reflect the reserves it probably would have received had it been able to remain independent in the San Juan Basin area.

Now, we understand that mathematical certainty is impossible. To some degree, you can't unscramble eggs, and you can't predict on the basis of hindsight completely. Nevertheless, it's clear that something in addition to what the company receives under the El Paso divestiture plan should be awarded to it. And we will present to your Honor in brief a more detailed presentation of the specific amounts that we're interested in and that we're speaking of.

But in this same regard, I think it should be recalled that the Supreme Court found that Pacific Northwest was no feeble or failing company, nor was it inexperienced and lacking in resourcefulness. It was one of the two major interstate pipelines serving the trans-Rocky Mountain states. It had raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant that it was viewed with concern and coveted by El Paso.

We believe, your Honor, that a failure to provide for an appropriate allocation of these combined gas reserves would tend to make New Company a more feeble competitor than Pacific Northwest would have been had it remained independent of El Paso.

[fol. 454-285] As a third point, your Honor, I would like to refer to certain contracts. Now, these contracts are included as part of the defendant's divestiture plan. As part of the El Paso plan, certain contracts will be assigned to New Company. Except for the Sumas contract, which is I believe the first of the series in the El Paso report, I believe that it's been brought out that these contracts are not the same contracts that were in effect at the time the merger occurred; that is, December 31, 1959. There have been changes. The contracts in this report are changed from the contracts that existed.

Now, the Antitrust Division, your Honor, has no intention of passing itself off as a group of natural gas experts. We think, your Honor, that any inquiry into the reasonableness or the appropriateness of these changes should be

based on two considerations; first, any contract once made, subsequently altered, would be altered as a result of arm's length negotiations between two equal parties. The changes here, your Honor, we view them as being unilaterally made by El Paso. To a large extent, El Paso has bargained with El Paso. And New Company will, if I understand it correctly, be bound substantially by the changes made or by the new forms of these contracts.

We think that some effort should be made in fashioning [fol. 454-286] a decree that would enable an independent management of New Company to negotiate any changes in these contracts at an arm's length position with El Paso.

Perhaps the El Paso position is well taken, but we believe that the normal negotiations and competitive bargaining features of the marketplace should be allowed to determine that, subject, your Honor, to this other qualification of the usual rights that the Federal Power Commission has to oversee revisions of contracts in order to assure appropriate rate structures and other matters connected with the natural gas regulation in which it's engaged.

We are concerned, frankly, that the changes in these contracts may tend to bind the Federal Power Commission so that they will not have the ability to perform their usual jurisdiction with respect to these contractual matters. This does cause us great concern.

The fourth item, your Honor, relates to a specific asset; that is, the 1,157,125 shares of West Coast Transmission Company, Ltd. These shares were an asset of the acquired company at the date Pacific Northwest was acquired by El Paso. They are a valuable asset. There may be very sound antitrust reasons for requiring New Company not to continue to hold a substantial interest in another gas pipeline company, its supplier; and there may be very sound antitrust reasons for requiring as part of this decree that those shares be sold, and not held by New Company [fol. 454-287] or by El Paso.

But we think that in fairness, your Honor, the proceeds of an asset that was acquired in this merger should be

returned as part of the divestiture to the company that is being created. This is a very valuable asset.

I believe that the record would tend to show that it's probably worth after tax about $14.5 million. It's a good leg up the ladder for a new company just starting out to serve existing markets and trying to serve additional markets.

We think it would be a substantial benefit to the New Company, and we think that they are entitled to it. El Paso, in our view, is not justified in picking and choosing among the assets it acquired when it acquired Pacific Northwest in determining which it will retain and which it will return.

One other point, your Honor, relates to the allocation of perhaps a more complicated asset, and that is the tax loss carryover.

Now, we believe that El Paso should be required to account in some acceptable and usual accounting manner for a part of that asset that it acquired from Pacific Northwest. If Pacific Northwest could not have used that asset on any circumstance, then obviously El Paso has nothing to account for; but we maintain that it is an appropriate [fol. 454-288] inquiry to determine the extent to which an independent Pacific Northwest could have used the tax losses that it had already sustained. And to the extent that it is possible to do so, we think that some fair allocation ought to be made and can be made to the new company that will be created.

Your Honor, there are many points relating to the El Paso divestiture plan that can be attacked, picked at, sniped at. We do not intend to do that, your Honor, at this proceeding. The points that I have mentioned are the points that have given the government its principal concern: the matter of the spinoff, the matter of the gas reserves, the matters of these revisions and changes in the contracts that have been unilaterally accomplished, the matter of the West Coast Transmission stock or the pro-

ceeds of the sale of this stock, and the matter of the tax loss carryover.

These are our principal concerns, but I would like to emphasize once more that if a choice had to be made among all of them, undoubtedly the spinoff itself is of paramount importance to the government. That is the key antitrust matter of this case: that there be a New Company established that doesn't have—that like Caesar's wife, your Honor, doesn't even stand in suspicion of not being in a competitive position with El Paso.

And I may remark, your Honor, that this company, if it's established independent of El Paso, would by the same [fol. 454-289] token be an independent competitor of Pacific Gas and Electric, would be an independent competitor of the Tennessee Gas Transmission Company that's trying to enter California, and would be an independent competitor of the Transwestern Pipeline Company. It would be an independent competitor not only of El Paso, but it would take its place in the market as an individual competing entity against all comers.

We'd like to call our first witness now.

The Court: Well, it's time for lunch. We'll see you at two.

Mr. Lipson: Thank you, your Honor.

(Whereupon a recess was had until 2:00 p.m.)

[fol. 454-290]

AFTERNOON SESSION

2:00 p.m.

Mr. Harrison: Mr. Boyd is prepared to finish his answers now, your Honor.

The Court: Very well, Mr. Boyd.

HOWARD BOYD resumed the stand and testified further as follows:

Cross examination (contd.).

By Mr. Lipson:

Q. Mr. Boyd, during the luncheon recess have you had the opportunity of looking into the deliverability life matter previously discussed?

A. Yes. I have talked to our petroleum reserve engineer. He says that the calculation—

The Court: Don't you think you ought to get this with the engineer?

The Witness: Yes, that's Mr.—

By Mr. Lipson:

Q. Well, are you able to make the estimate that we spoke of previously, that is the effect on New Company's deliverability life of an increment of 250,000 Mcf?

A. I can only answer it this way, that it would be very short; it would be something around two or three years.

Mr. Lipson: May I confer with the witness, your Honor?

The Court: Certainly.

(Counsel and witness confer.)

[fol. 454-291] By Mr. Lipson:

Q. Will you refer to the balance sheet on Defendants' Exhibit "A".

A. Yes, sir.

Q. I refer your attention to the item previously discussed, "Excess Cost of Investment in Former Subsidiary over Book Value, $2,535,091."

Would you explain that account, sir.

A. Yes. This presupposes the merger of Northwest Production into New Company. As I testified yesterday, whether that is done, of course, will be a decision to be made by the management of New Company. We have shown it on this basis because it seems to us that for business reasons it should be done and we are confident that those reasons are sufficiently sound that New Company will arrive at the same conclusion, and what this represents is the excess of cost paid for the stock of Northwest Production over and above the value of the underlying assets.

Q. Let me refer your attention, Mr. Boyd, to the item at the very top of the column under the assets: "Utility Plant" and the sub-item, "Net Utility Plant" of 263,640,013 dollars. Included in that sum is there a sum representing the Northwest Production assets?

A. I am confident that that is so.

Q. And that would be in the neighborhood of what, Mr. Boyd?

A. Oh, I think it is—well, I will have to get that figure [fol. 454-292] for you. I am pretty sure it is something less than 15 million dollars.

Q. Would it be in the neighborhood of 15 million dollars?

A. I don't like to guess about these things. We will get that figure for you, Mr. Lipson.

Q. Then the balance sheet, as it presently appears in Tab 11, is based on at least two hypotheses, is it not?

Mr. Lipson: Strike that, please.

By Mr. Lipson:

Q. The balance sheet in Tab 11 has at least two items on it that are based on hypotheses which may or may not eventuate, that is, the merger of Northwest Production into New Company?

A. But bear in mind the end result would not be different. If you did not merge it, then the price of the stock would simply be carried as an investment, which would be an asset. So that the bottom line figures would be the same. The only difference is in the way in which the figures are set down up above.

Q. But the figure for "Net Utility Plant" would be somewhat lower?

A. It would be somewhat lower and in an exactly corresponding amount there would be an increase in a title under "Investment."

Q. And the item "Excess Cost of Investment in Former Subsidiary over Book Value" would not appear at all, would it?

[fol. 454-293] A. That's right. That would go out, and that amount, though, would appear under a different title.

Q. What title, sir?

A. It would appear under "Investment."

Q. Well, then, the net utility plant of New Company would be substantially lower than presently shown on this balance sheet?

A. That is correct. And then you see the very next major topic, "Other Property and Investment"; that would go up by a corresponding amount.

Q. In general, Mr. Boyd, is the net utility plant figure the figure on which a pipeline company's rates are based?

A. Generally, yes, and if Northwest Production were to be carried in the condition that it was at the time we took over Pacific Northwest, why, then, it would have to look to Pacific Northwest for revenue that Pacific Northwest would generate as a separate corporation.

Q. Just as a matter of information, Mr. Boyd, are you aware of the fact that Northwest Production has been losing money in recent years?

A. Oh, yes. That is one of the reasons why we think that from a business standpoint—excuse me—from a business standpoint it ought to be merged into New Company.

Q. But as an item under "Net Utility Plant," then, those losing assets would be entitled to earn a rate of return from [fol. 454-294] the gas purchasers from New Company?

A. That would be a matter up to the Federal Power Commission. This is money that was spent for the benefit of gas consumers. No matter how you look at it, it was money that was spent in well drilling and laying of gathering lines, and there is also involved in that a processing plant, so that that is money that was spent for the benefit of the gas consumers, and it seems to me that by one fashion or another the people that made the investment are entitled to be reimbursed for it.

The only difference, Mr. Lipson, is whether or not the earnings would be reflected in New Company or whether it would be reflected in two corporations, one being New Company and the other one being Northwest Production.

[fol. 454-295] Q. Mr. Boyd, let me show you a document entitled, "Northwest Production Corporation," and ask you to examine that document. Does that document refresh your recollection, sir, as to the loss, the net loss incurred by Northwest Production Corporation for the year 1963?

A. No, it does not refresh my recollection. I see that this has been compiled from Moody's. And if you wanted to know what the net loss was, we can let you know. We haven't been asked before, but we can let you know.

Q. Well, could you check out the figures on this document—

Mr. Harrison: I submit the document is irrelevant. It hasn't been identified as having come from an authentic source.

Mr. Lipson: Mr. Boyd volunteered he would let us know, your Honor. I'm just taking his offer.

The Court: He'll tell you.

Mr. Lipson: Yes, sir.

The Witness: Excuse me, Mr. Lipson, I thought you were only inquiring about the loss. Do you want us to check every item on this?

By Mr. Lipson:

Q. No, just the item underneath income for each of the years '58, '59, '60, '61, '62, '63. Six figures all together. Mr. Boyd, have you inquired into the source of the three trillion cubic feet of gas that we were referring to in this morning's testimony?

[fol. 454-296] A. Yes.

Q. Have you prepared a tabulation indicating that?

A. Yes, I have. Kings Gate, we attribute 1,020 billion cubic feet. Big Piney, 1,545 billion cubic feet. Rocky Mountain area, 141 billion cubic feet. San Juan, 285 billion cubic feet. And the total of that is 2.991 trillion cubic feet.

Q. In your tabulation did you break down Big Piney into two separate sections, Mr. Boyd?

A. What do you mean by two separate sections?

Mr. Lipson: Well, let me identify the document if I may. Would the clerk please identify this document as Plaintiff's Exhibit No. 10?

(Plaintiff's Exhibit No. 10 was thereupon marked for identification.)

By Mr. Lipson:

Q. Did you prepare this document, Mr. Boyd?

A. No.

Q. Was it prepared under your direction?

A. Yes, at my request.

OFFERS IN EVIDENCE

Mr. Lipson: I'd like to offer the document, your Honor.

The Court: Any objection?

Mr. Harrison: No objection.

The Court: Received.

(The document marked Plaintiff's Exhibit 10 for identification was received in evidence.)

[fol. 454-297] By Mr. Lipson:

Q. Referring to Plaintiff's Exhibit No. 10, I notice that Big Piney has two separate items; one of 345 billion cubic feet and the other of 1,200 billion cubic feet. Would you explain why there are two separate items?

A. No, I don't know why it was broken into two parts. It was the total of Big Piney that I was interested in.

Mr. Lipson: I understand that on the record I omitted to make a statement that I had intended to make that I had no intention of cross examining Mr. Kayser any further, and I now make that statement.

By Mr. Lipson:

Q. With respect to the contract that we spoke of this morning, I understand that they're going to be delivered in the due course?

A. Well, it depends on—I have some contracts right here. Just what do you have in mind?

Q. Well, the contracts relating to Government Exhibit No. 3 and the corrections you made thereon, or the changes you made thereon.

A. Yes. We will have those contracts available, either here or in El Paso, wherever you want to take a look at them.

Q. And the Belco contract?

A. Yes. Now, I have some Belco contracts right here in my hand. This is what we had here in the Salt Lake City office.

Mr. Harrison: My understanding is we have a stipulation that these exhibits may stand, but you will have an [fol. 454-298] opportunity to examine the documents, and if you have any later occasion to take exception, we will be pleased to have you do so.

Mr. Lipson: That is my understanding, too, your Honor. I have no further questions.

The Witness: Mr. Lipson, if I may volunteer something here, your Honor, because there's a confusion in this case that I'd to explain for Mr. Lipson's benefit, and I think it will clarify the record. Mr. Lipson, that book that lists a lot of contracts, over a thousand contracts, you examined that, and you're not able to see where there has been acquired for New Company three trillion cubic feet of gas during the period that the northern division was under our stewardship. Now, the reason for that is that that does not purport to show all of the acquisitions of the northwest division during our stewardship. That documents answered your question, as we understood the question. But in addition to the new contracts that are listed in that book, we negotiated supplements to many old contracts. And here in my hand are conformed copies of supplements which El Paso—and in large measure I did this personally—negotiated for additional gas on the northwest division during the period that the northwest division was under our stewardship.

These supplements which I hold in my hand account for gas totaling 1.2 trillion cubic feet (handing).

[fol. 454-299] By Mr. Lipson:

Q. I thought there was a 1.3 trillion missing, Mr. Boyd.

A. Yes, there it is.

Q. Can you tell me, Mr. Boyd, the approximate date of the contract to which the supplements are made?

A. Well, I think that they may reflect on their face, Mr. Lipson—let me see if they do not—because they are supplements. Yes. For example, I'm just taking the first one here. Reference is made to that certain agreement dated May 15, 1956. And I think you'd find that was the basic contract, the supplement having been executed—or being dated August 16, 1958.

Q. Well then, in a certain sense, Mr. Boyd, the Pacific Northwest Pipeline Corporation had a kind of string on this supplement on the basis of its original contract, had it not?

A. Well, that is not what we considered necessarily to be a string. And, for example, let me illustrate what had to be done in order to get one of those contracts, the largest of those supplements. Bear in mind, the producer is under no contractual obligation to supplement his contracts. All you can do is to negotiate with him. And if you're not willing to meet his terms, he just does not execute a supplement. And if he has, as was true in those instances, uncommitted gas he's free to go out and sell it to somebody else.

Now, we negotiated with Belco Petroleum. I carried on [fol. 454-300] the negotiations myself. And during the course of those negotiations we agreed that we would make advances to Belco Petroleum for use in the drilling of wells, and those advances which were repayable by the pay only out of gas—if the gas had not been discovered, why, the advances would have been lost. We made advances which got up to a total of $1,840,001. That was the advances as they stood as of December 31, 1960.

Now, since those advances are payable out of gas, those advances have been worked down to the point where on December 31, 1963, the advances were $1,296,291. That is, that money is repayable only out of gas, and we have shown that the repayment will be made to New Company. If you look at Tab 1 in our plan of divestiture, you will see under, "investments," "Belco Petroleum Corporation, $1,175,000."

That's what we estimate will be the amount of unrepaid advances as of the date of the transfer of the properties. So that's what we'd do to negotiate that particular supplement. I do not consider that to be any sort of a contractual right that permits you simply to go out and secure without effort a supplement to the contract.

Mr. Lipson: I've taken the liberty of having the documents that you've just handed to me, Mr. Boyd, marked Plaintiff's Exhibit for identification No. 11, and I'd like to offer them now, your Honor.

The Court: Received.

[fol. 454-301] (Plaintiff's Exhibit No. 11 was thereupon received in evidence.)

Mr. Lipson: I'd just like to draw your Honor's attention to a few items that I noticed on the exhibit. A letter agreement dated August 16, 1958, in re gas purchase contract, Hogsback Unit Area, Sublette and Lincoln County, Wyoming, to the General Petroleum Corporation. "Gentlemen." the first sentence reads: "Reference is made to that certain agreement dated May 15, 1956, between General Petroleum Corporation and Pacific Northwest Pipeline Corporation and to the several amendments thereto, and more particularly to that certain letter amendment dated March 24, 1958."

I refer to another letter agreement from Pacific Northwest Pipeline Corporation dated March 22, 1958, also to General Petroleum Corporation. "Gentlemen: This letter refers to the agreement dated July 15, 1953, between General Petroleum Corporation and Pacific Northwest Pipeline Corporation." I'm omitting the parenthesized portions, your Honor.

Another letter dated March 24, 1958, from Pacific Northwest Pipeline Corporation to Phillips Petroleum Company, Bartlesville, Oklahoma, re gas purchase contract, Hogsback Unit Area, Sublette and Lincoln Counties, Wyoming. "Gentlemen, this letter refers to the agreement dated June 23, 1956, between Phillips Petroleum Company and Pacific Northwest Pipeline Corporation."

[fol. 454-302] Your Honor, I would like to refer to another letter from Pacific Northwest Pipeline Corporation dated November 14, 1957, to Belfer Natural Gas Company, 42 Broadway, New York, New York. "Gentlemen: This letter refers to an agreement dated August 26, 1955, between Arthur B. Belfer, Rachel Belfer, Selma Ruben, Lawrence Ruben, Jack Saltz, Anita Saltz," and others, your Honor.

I would like to refer to another letter, your Honor, from Pacific Northwest Pipeline Corporation dated August 7,

1957, to Belfer Natural Gas Company, 42 Broadway, New York 4, New York. "Dear Sir: In reference to that certain gas sales contract dated August 26, 1955, by and between," and then a number of persons' names are specified, your Honor. I won't repeat them at this time.

By Mr. Lipson:

Q. Do I understand, Mr. Boyd, that these relate to the Big Piney area generally?

A. That's right.

Q. And do I understand that the letters I have in my hand to which I have referred do not represent all letters of a similar character? That there are others?

A. There are others, but they're not particularly significant.

Mr. Lipson: Thank you.

The Court: Now, what do you claim for this?

Mr. Lipson: Your Honor, this gets back to that 3 billion figure again.

[fol. 454-303] The Court: Three trillion.

Mr. Lipson: I'm sorry. Three trillion figure. Mr. Boyd has indicated—as I understand from what Mr. Boyd has testified, 1.2 billion of that comes as the result of supplements on contracts that existed prior to the date that El Paso acquired the stock control of Pacific Northwest. Pacific Northwest had the underlying contracts that have been referred to in these letters, Your Honor; and it seems, if not as a legal conclusion, that it at least is an arguable business and economic conclusion that the party that has the underlying contract will tend—not necessarily, your Honor—but will tend to be the party who will be able to obtain the supplemental contract. Therefore, it is not clear that El Paso has been responsible for giving Pacific Northwest 1.2 trillion cubic feet in gas that Pacific Northwest wouldn't have otherwise been able to secure for itself in the Big Piney area.

Mr. Harrison: I don't wish to argue all the inferences that counsel has, but I do wish to suggest that that is not the testimony of the witness, your Honor, on which he re- of the witness is that it's completely within the purchase, of the witness is t hat it's completely within the purchase, independently negotiated, and paid for by El Paso.

Mr. Lipson: The letter numbers, your Honor, relate to the earlier contract.

[fol. 454-304] The Court: Well, I know. I understand what you're talking about.

Mr. Lipson: I have no further questions of Mr. Boyd, your Honor.

The Court: That's the most effective suggestion to a witness that I've ever observed.

Mr. Lipson: Mr. Boyd at one time inquired personally of whether I had a great deal of trust in him. I think I do.

The Witness: I appreciate that.

Mr. Harrison: I have no questions of Mr. Boyd.

[fol. 454-305] Mr. Lipson: Your Honor, the Government would like to call to the stand Mr. George F. Hess.

DEFENDANT, EL PASO RESTS

The Court: Where are we in the proceeding? Are you folks through?

Mr. Harrison: Yes, your Honor.

The Court: El Paso rests?

Mr. Harrison: Yes, your Honor.

The Court: In this proceeding?

Mr. Harrison: Yes, your Honor.

The Court: Very well, go ahead.

GEORGE F. HESS called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Mr. Lipson: Your Honor, before we commence the examination of Mr. Hess, I have been reminded—

Mr. Harrison: Would you mind speaking a little louder. My hearing is kind of second class. I am getting a little older.

Mr. Lipson: I inadvertently omitted to distribute certain briefs we intended to distribute prior to calling Mr. Hess to the stand. I would like to do so now.

The Court: We ought to get some chairs around here that do not all squeak. The next recess will you put a dif-
[fol. 454-306] ferent chair here on the witness stand and get the building maintenance people up here to oil mine.

All right, go ahead.

Direct examination.

By Mr. Lipson:

Q. Will you state your name, please.

A. Mr. George F. Hess.

Q. Your address?

A. My business address is 4517 Minnetonka Boulevard, Minneapolis, Minnesota.

Q. What is your profession, Mr. Hess?

A. Consulting engineer.

Q. Where did you receive your engineering education?

A. I was graduated from George Washington University.

Q. When?

A. In May, 1951.

Q. On graduation what degree did you receive?

A. I received the degree of Bachelor of Science in Engineering, with a major in chemistry.

Q. What position did you take on graduation?

A. In the summer of 1951 I worked in the Heaton Power Division of the National Bureau of Standards as a chemical engineer. My work there consisted primarily of research work on the thermodynamic properties of gases.

Q. With what firm were you associated during the period
[fol. 454-307] November of 1951 through January, 1964?

A. From November '51 to January, 1964 I was associated with Martin T. Bennett, consulting engineer, in Washington, D. C.

Q. What was the nature of your work with the Bennett firm?

A. In that position I was involved in all phases of public utility regulatory matters. In rate proceedings I have been responsible for the analysis and preparation of cost of service studies, including valuation, depreciation, allocation in present-day cost studies.

Among the applicant companies were gas companies, combination gas and electric companies, and electric, steam, transportation, telephone, and water utilities. I have also participated in certificate proceedings before the Federal Power Commission.

Q. Were those gas company certificate proceedings, sir?

A. Yes, sir.

Q. Since April of 1964 what has been the nature of your business?

A. In April, 1964 I opened my own consulting practice in suburban Minneapolis. I have been retained by the Suburban Rate Authority to administer the franchises granted by 26 suburban communities to the Minneapolis Gas Company. As consultant to the Rate Authority, I continuously reviewed the operations and accounting of the Minneapolis Gas Company, and I have the authority to amend, revise, or alter any rate charged by the Minneapolis Gas Company [fol. 454-308] in the suburban communities not in conformance with those franchises.

Q. Are you self-employed in your business?

A. Yes, I am.

Q. Have you previously testified before the Federal Power Commission on matters relating to natural gas?

A. Yes, I have testified before the Federal Power Commission in Texas Eastern Transmission Corporation, in Texas Eastern (Pen-Jersey) Transmission Corporation, in consolidated proceedings Dockets G 2503 and G 7984.

Q. Have you previously testified before the New York Public Service Commission on matters relating to natural gas?

A. Yes. On behalf of the New York City Housing Authority I have testified before the Public Service Commission of the state of New York on matters relating to the gas rates of the consolidated Edison Company of New York.

Q. Have you previously testified before the New Jersey Board of Public Utility Commissioners on matters relating to natural gas?

A. Yes.

Q. In what connection?

A. On behalf of special counsel appointed by the Attorney General of the state of New Jersey, I testified before the Board of Public Utility Commissioners on matters relating to the gas rates and electric rates of public service electric and gas companies.

[fol. 454-309] Q. Have you previously testified before the Texas Railroad Commission on matters relating to natural gas?

A. Yes. On behalf of a number of Texas towns and cities I have testified before the Texas Railroad Commission Gas and Utility Division on matters relating to the gas rates of the Lone Star Gas Company.

Q. Have you previously testified before the Pennsylvania Public Utilities Commission on matters relating to natural gas?

A. Yes. I have testified for the city of Erie and county of Erie on matters relating to the gas rates of the Pennsylvania Gas Company.

In addition, I have testified in proceedings on behalf of the city of Pittsburgh on matters relating to the rates of the Manufacturers Light and Heat Company and the Equitable Gas Company.

Q. Have you been called on to advise the San Antonio city council on matters concerning natural gas?

A. Yes. I have appeared before the city council of the city of San Antonio on behalf of the city to advise them on

matters relating to the gas and electric rates charged by the City Public Service Board.

Q. Are you a registered professional engineer, sir?

A. I am.

[fol. 454-310] Q. In what jurisdictions?

A. In Minnesota and the District of Columbia.

Q. Are you a member of any professional societies?

A. I am a member of the National and D. C. Society of Professional Engineers.

Q. Have you had an opportunity to review the El Paso divestiture plan?

A. I have.

Q. At what time, in terms of what date, did you begin your review of the plan?

A. Well, not of the divestiture plan, but of matters relating to the divestiture, at the end of July of this year.

Q. Have you received any information directly from El Paso relating to these divestiture proceedings?

A. Yes, we have, and we have requested certain information and have been supplied information relating to gas reserves, flow diagrams, and income statements.

Q. What other sources of information have you reviewed in connection with these divestiture proceedings?

A. I have reviewed certain data in the files of the Federal Power Commission in various certificate proceedings involving El Paso, and particularly exhibits and testimony, or parts of exhibits and testimony, in the current Gulf Pacific case. I have also reviewed annual reports filed with the Federal Power Commission by Pacific Northwest Pipeline Corporation and El Paso Natural Gas Company.

[fol. 454-311] (Plaintiffs Exhibit No. 12 was thereupon marked for identification.)

By Mr. Lipson:

Q. Mr. Hess, I show you a document marked Plaintiff's Exhibit No. 12 for identification and ask you if you can identify that document?

Mr. Harrison: Will you let me look at it first, please.

Go ahead, Mr. Lipson.

Mr. Lipson: Thank you, Mr. Harrison.

By Mr. Lipson:

Q. Does that document purport to show a breakdown of estimated gas reserves of Pacific Northwest Pipeline Corporation as of December 31, 1959?

A. Yes, it does.

Q. Did you prepare this chart?

A. I did.

Q. What were the sources that you used in preparing it?

A. The information shown on this chart was tabulated from data included in the annual report of Pacific Northwest Pipeline Corporation to the Federal Power Commission for the year ended December 31, 1959.

OFFERS IN EVIDENCE

Mr. Lipson: Your Honor, I offer Government's Exhibit No. 12.

Mr. Harrison: I have no objection.

The Court: Received.

[fol. 454-312] (The document marked Plaintiff's Exhibit No. 12 for identification was received in evidence.)

Mr. Lipson: Your Honor, referring to the Government's Exhibit 12 just admitted, I would like to draw your Honor's attention to the following figures: The estimated reserves at 12/31/59 in billions of cubic feet for the total San Juan Basin area for the Pacific Northwest Pipeline Corporation are 4,756.7 billion cubic feet, that is, your Honor.

I would also like to draw your attention to the total system reserves of Pacific Northwest as of December 31, 1959, the merger date, at 10,496.7 billion cubic feet. And I invite your Honor's comparison of those figures with the figures of gas—

Mr. Harrison: Now, if the Court please, we wish to argue the comparison. If he is merely putting the exhibit in, that is one thing, but if he is going to make an argument about a comparison of apples and oranges, I want to be heard on it.

The Court: You don't have to worry about being heard, Mr. Harrison. I am going to listen to you in expenso.

Mr. Harrison: Very well. I was merely indicating this was not the time for argument.

Mr. Lipson: I would like to call your Honor's attention to Tab 7 of the divestiture plan submitted by El Paso. The total reserves to be dedicated to New Company according [fol. 454-313] to that plan, in billions of cubic feet, are 7,592.9. The total reserves, according to Tab 7, to be dedicated to New Company from the San Juan system are 2,518.1 billion cubic feet.

Mr. Harrison: And they are based upon entirely different systems of measurement determination, as Mr. Boyd testified, may it please the Court, and that is the reason I thought the argument might better be deferred.

The Court: We are not arguing it.

Mr. Lipson: Will the clerk mark this next document as Plaintiff's Exhibit for Identification No. 13.

(Plaintiff's Exhibit No. 13 was thereupon marked for identification.)

Mr. Lipson: And I show it to counsel.

By Mr. Lipson:

Q. I show you Plaintiff's Exhibit No. 13 for identification, Mr. Hess, and ask you if you prepared that document?

A. I did.

Q. Does that document purport to show a breakdown of estimated gas reserves of El Paso Natural Gas Company as of December 31, 1959?

A. Yes, it does.

Q. And what was the source that you used in arriving at the figures that appear on that document?

A. The figures on this document were compiled from the annual report of El Paso Natural Gas Company to the [fol. 454-314] Federal Power Commission for the year ended December 31, 1959.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Harrison: I submit—pardon.

Mr. Lipson: I offer 13, your Honor.

Mr. Harrison: I submit that the determination of the total gas reserves of El Paso Natural Gas Company can't be anything but totally irrelevant to this hearing.

Mr. Lipson: Your Honor, they are necessary in order to lay a foundation for drawing a comparison between the reserves of El Paso compared to the reserves of Pacific Northwest prior to the merger and the reserves of the two as ratios of each other on the basis of El Paso's present plan.

Mr. Harrison: May I ask whether counsel is now going to contend that he is going to determine the resources of gas of El Paso Natural Gas Company and ask this Court to carve out some liberal portion or percentage thereof? I submit it is immaterial.

Mr. Lipson: Your Honor, I would merely state that my contentions appear in the brief and the opening statement that I made to your Honor.

The Court: Well, I don't understand why we have to go into the natural gas reserves of El Paso Natural Gas Company.

Mr. Lipson: Merely for the purpose of comparing the relative positions of the two before and after the merger, [fol. 454-315] your Honor. We think it will be enlightening to the Court.

The Court: Well, what is it going to teach me?

Mr. Lipson: Among other things, your Honor, the Plaintiff's Exhibit No. 13 breaks down the El Paso reserves into the Rocky Mountain area reserves, the San Juan Basin area reserves, and all other reserves. We are interested

particularly in this case, your Honor, in the question of the San Juan reserves and of the Rocky Mountain reserves. That certainly already has been made an issue in this case, the comparative positions of the two companies in those areas; and, frankly, your Honor, the figures would have been incomplete if we just didn't include in the total what the other reserves would be.

Mr. Harrison: Let me say, may it please the Court, that so far as we are concerned we know of no such issue as counsel as mentioned. The question here is the fact of the decree of divestiture of certain assets to create what was formerly Pacific Northwest Pipeline Company competition in the market.

The percentages it may have as compared to El Paso, the percentage of reserves in San Juan, or percentage of reserves anywhere else is utterly immaterial. We are not trying out how much of El Paso's assets and funds in gas are to be transferred to a new company. That is not the issue here.

[fol. 454-316] The Court: That would seem so to me, Mr. Lipson.

Mr. Lipson: Your Honor, may I respond to that.

The Court: Surely.

Mr. Lipson: From information already appearing in the record of this case it has been shown, with reference to the San Juan Basin area particularly, both companies had actively competed to secure gas in the San Juan Basin before the stock acquisition date. After the stock acquisition date, the activities of Pacific Northwest securing gas in the San Juan Basin area abruptly ceased. Nevertheless substantial additional quantities of gas continued to be discovered, continued to be developed, in the San Juan Basin area. A period of roughly eight years has passed, and during that period of time there have been substantial additional amounts of gas uncovered in the San Juan Basin area. From the testimony given by Mr. Boyd it appears that the properties in the San Juan Basin that are going to be returned or divested to New Company will

consist exclusively of the properties held by Pacific Northwest Pipeline Corporation before, without giving any consideration to the discoveries of additional gas in the intervening years. It certainly would appear that in the intervening years a company that has been characterized as an aggressive competitor would have continued to seek and develop reserves in the San Juan, which, of all these reserve areas to which the company was attached, was [fol. 454-317] easily determinable the closest geographically to the California market for which it was competing.

It would seem to be unrealistic to disregard the fact that this company's position in the San Juan has been frozen since the stock acquisition date. And we submit, your Honor, that this Court, in fashioning a decree, must give consideration to a fair allocation, not of the entire reserves of the El Paso Company—we are not asking for anything of that nature, your Honor—but certainly, with respect to the San Juan Basin area where they both had been actively competing in the past, there should be some consideration given to an allocation of the post merger reserves that have been uncovered there.

Mr. Harrison: If your Honor please, in the first place, it is a matter of law, which we would be glad to bring to your Honor. The law is against counsel. The Supreme Court has held more than once that it lies not within the power and certainly is not the law that a court will take from the company which has acquired another company in violation of Section 7 its properties which it has acquired with its own capital subsequent to that acquisition, unless there is a definite nexus proved between the property acquired and the property subsequently acquired. And that is not the case here.

[fol. 454-318] Now, I question the record in this court to which counsel refers and what the Supreme Court has said. As a matter of fact, the Supreme Court pointed out, as indeed the Solicitor General did, and as all the evidence here was that the competition to California which the president of the Pacific Northwest Pipeline Company contem-

plated was from Canada. He went to Southern California Edison Company and thought he had a chance to sell 300 million cubic feet of gas a day, and there wasn't any such demand, and so it fell apart.

Nevertheless, the basis of his offer was a contract with Mr. McMahon in Canada who furnished 300 million cubic feet of gas a day. And his plan was to come to California through Klamath Falls. And he positively declined, in any subsequent relation with El Paso or otherwise, to offer any gas from San Juan to California.

Now, I don't know why it is assumed that Pacific Northwest would buy some gas in San Juan, particularly gas that El Paso bought. Why wouldn't they have done up and bought in Big Piney, where we have bought, the gas that was given them, far in excess of the gas necessary to make up the reserves that they had when we acquired the company.

Why wouldn't they be exploring, as they said they would, in the Rocky Mountain area? Why wouldn't they buy elsewhere? There is plenty of gas to be had.

[fol. 454-319] The truth of the matter is, and what counsel is asking is, in effect, that we go back and we speculate upon what might have been perhaps the earnings of Pacific Northwest had we not acquired them and said, "Now, capitalize the earnings and give us some money".

Just as he said this morning, "You have some stock and we insist upon it being sold and converted to cash, but you give the cash to New Company."

What this New Company is interested in and what the law insists on is the transfer of the operating properties which we acquired, and we are offering a great deal more than that. We are offering a total picture, and counsel insists on trying to fragment little items from that total picture. And in that total picture we are giving far more than Pacific Northwest could ever hope to have had it survived to this day.

The objection, however, was the total reserves of El Paso. And I submit that has no relationship even to the contention that counsel now makes.

Mr. Lipson: Your Honor, some reference was made in Mr. Harrison's statement as to a contention that may or may not have been made by the Solicitor General, and I think I should clear the matter up completely before the Court.

In the brief submitted by the Solicitor General before the Supreme Court in this case the Solicitor General stated in a footnote on Page 2:

[fol. 454-320] "We have not receded from our position that the merger of two major pipeline companies which tends substantially to lessen competition in the acquisition of natural gas supplies constitutes a violation of Section 7."

Your Honor, Pacific Northwest, the Supreme Court found, was not a feeble competitor. It posed a real threat to the California market. If Pacific Northwest is not given an opportunity to have some fair allocation of the post merger gas that El Paso and Pacific Northwest combines, as a merged company, developed in the San Juan Basin after the merger date, they will, in fact, be created to be a feeble competitor in the California market.

Mr. Harrison: Well, now, I would like to justify one statement I made. I am quoting the Solicitor General in the Supreme Court, your Honor:

"Furthermore, we know, Mr. Justice, that Pacific both in inherent position of where it was under a necessity of seeking this market and where it is forming this bridge, it almost seems inevitable in the logic of the situation that some independent company, the Pacific if it had remained independent would have continued to try to link the important new Canadian reserve and the important Rocky Mountain gas area with this enormous California market."

[fol. 454-321] What the Supreme Court held was, in fact, that this company had made an effort to enter California and that its mere existence in making an effort constituted competition.

And Mr. Solicitor General Cox, when asked whether the Pacific Northwest could have sold in California, he admit-

ted that they could not then have sold. He admitted in his brief that they would not have been able to sell for years and years down the line, which he could not predict, and when he was asked by the Court as to what the probability was—it might take me a second to find this, but it is extremely pertinent—said the probability was somewhere between—

Well, I recall the words, and I can verify it. He answered the Justice of the Supreme Court by saying, with respect to reasonable probability of competing, that it was a future possibility and it was somewhere between a conjecture and a possibility that it would enter this market.

Now, the whole background of this case—and the Supreme Court fully understood it, and it is perfectly clear in its decision to this Court is this: that any company that is in the natural gas business—the president of the Pacific Northwest, for example, before the acquisition—said that when he found a market demand and an opportunity to sell, and when he could locate a source of supply [fol. 454-322] to sell, he could build a pipeline, because he could finance it.

And that is exactly what every pipeline in the United States does when it gets up a new project. It doesn't stand by with a barrel of gas offering it to the public. It has to first find a segment of market demand, which, according to the Solicitor General, will happen at some time in the future. And the prospect of Pacific Northwest to have served it was more in the way of conjecture and possibility than probability.

That is the kind of a company we had. We are not trying to create a company to create a project to California without a market and without a buyer. That is up to the company, after it gets on its feet, to undertake to compete. It is for it then to create a new project interstate if it chooses to, and it is for it to go to the Federal Power Commission to get approval if it can, and it is not for this Court to create a feasible interstate project to California out of this case.

[fol. 454-323] Mr. Lipson: Your Honor, I merely wish to observe that in the San Juan Basin area itself it has been brought out the basin is blanketed with a gathering system that El Paso, Pacific Northwest, and apparently Southern Union could all use. Therefore, the efforts of the New Company in the San Juan Basin area were not confined even to the specific well areas that it already developed. It had gathering facilities at its disposal, so that it could operate and search for and develop gas wells throughout the entire basin area.

As a matter of fact, substantial gas has been uncovered in the San Juan Basin area. That's already been established on the record, your Honor.

It's also been established that the San Juan Basin has relatively cheap gas, certainly compared to the Canadian gas reserves. With respect to the California market, the geographic proximity is there. California is an ever burgeoning market for gas, as evidenced, if nothing else, by the present proceeding that El Paso is engaging in in the Federal Power Commission to supply yet additional quantities of gas.

It is observed by the Supreme Court that even after the acquisition of the company there was still sufficient demand in California for more pipelines so that two other pipelines have yet entered; and in spite of that, still further applications are being made before the Federal Power [fol. 454-324] Commission to supply gas to California.

All we are saying, your Honor, is we do not want to terrace under El Paso. That is not the purpose of these proceedings. We have never regarded that as being the purpose of these proceedings.

But we think in all fairness, some allocation of the San Juan gas must be made to New Company in order to enable it to start to compete, to be in a position where it is a competitive threat to the California market.

The question of the moment, your Honor, is whether or not Government Exhibit No. 13—

The Court: This whole discussion rises on an offer of a document; and whatever may be the merits of your respective positions, I think you're each entitled to make your record on your own theories. And when we get the record made, I'll hear you fully on the subject.

So I'm going to receive the document. What is it?

Mr. Lipson: Government Exhibit No. 13, your Honor.

The Court: All right. It's received in evidence. Do you object to it, Mr. Harrison?

Mr. Harrison: Pardon me?

The Court: Do you object to this document?

Mr. Harrison: Well, yes. I have already registered my objection, your Honor.

The Court: All right. The objection is overruled. The [fol. 454-325] document is received.

(Plaintiff's Exhibit No. 13 was thereupon received in evidence.)

Mr. Lipson: Your Honor, I merely wish to observe that based on Government Exhibit No. 13, as of December 31, 1959, the San Juan Basin area, the estimated reserves of El Paso were 13,021.8 billion cubic feet.

By Mr. Lipson:

Q. I show you Government's Exhibit marked No. 14 for identification, Mr. Hess, and I ask you if you prepared that document.

A. I did.

Q. Does that document purport to show the estimated gas reserves in the San Juan Basin area of El Paso and Pacific Northwest in 1959 and to the merged company in the years 1960 through 1963?

A. Yes.

Q. What sources did you use in drawing this document?

A. The data shown on this document were obtained from annual reports to the Federal Power Commission of Pacific Northwest Pipeline Corporation for the year ended December 31, 1959, and of El Paso Natural Gas Company for the years ended December 31, 1959, through 1963.

Mr. Lipson: Your Honor, I offer Plaintiff's Exhibit No. 14.

Mr. Harrison: No objection.

[fol. 454-326] The Court: Received.

(The document marked Plaintiff's Exhibit No. 14 was thereupon received in evidence.)

By Mr. Lipson:

Q. With respect to Plaintiff's Exhibit No. 14, the chart you were just referring to, Mr. Hess, would you explain the basis for the drop between the years 1959 and 1960 and the estimated reserves in the San Juan Basin area of the combined companies?

Mr. Harrison: I object to the question until the foundation has been laid to show the basis upon which this witness is going to express this opinion, and his qualification to express it.

By Mr. Lipson:

Q. Do the resources to which you have referred to in drawing this chart explain the basis for the decrease shown between the years 1959 and 1960 and the estimated reserves of the combined company in the San Juan Basin Area?

A. At least in part.

Mr. Harrison: Well then, if your Honor please, I would like to have the opportunity to have the witness produce them and examine them.

By Mr. Lipson:

Q. Do you have the annual reports to the Federal Power Commission of Pacific Northwest Pipeline Corporation for the year ended December 31, 1959, and of El Paso Natural Gas Company for the years ended December 31, 1959, [fol. 454-327] through 1963 available?

A. I do not have the complete reports, but I have the schedule from which—schedules from which this table was drawn; and I have the schedule for the year 1960—

Mr. Harrison: I have not objected, your Honor, to the schedules. It is the last question I'm addressing myself to, which calls for a conclusion of the witness. A drop in figures between the two years.

Mr. Lipson: The witness has testified that at least in part the reasons are explained in the annual reports of the Power Commission.

The Court: We ought to get the document.

Mr. Lipson: The only difficulty with that, your Honor, the documents are somewhat complicated and complex; and Mr. Hess is qualified to summarize the facts of the documents, subject to a review of the documents themselves by counsel.

The Court: I don't think so. That isn't the way I understand the rules of evidence.

Mr. Harrison: If counsel will be kind enough to let me see the source material, I think that I have somebody here who will check it in a very few minutes.

Mr. Lipson: That's no problem.

Mr. Harrison: Why don't we do it right now?

The Court: Why don't you handle it that way. Turn [fol. 454-328] them over to Mr. Harrison, and he'll have his people check them.

By Mr. Lipson:

Q. Mr. Hess, would you make available to Mr. Harrison the documents to which you referred?

Mr. Harrison: I am referring only, Mr. Hess, to the material upon which you base your proposed expressions of opinions, the reason for the drop in the reserves between the two years.

The Witness: Yes, sir (handing to Mr. Harrison).

Mr. Lipson: Would you read the pending question?

(Mr. Harrison examines.)

(Question read.)

Mr. Harrison: I'm satisfied, your Honor.

By Mr. Lipson:

Q. Mr. Hess, do you have a copy of Plaintiff's Exhibit No. 14 before you?

A. Yes, sir.

Q. With reference to the difference in figures on the estimated reserves of the combined companies in the San Juan Basin area between 1959 and 1960, are you able to explain the basis for that decrease?

A. Yes.

Q. Will you do so?

A. During the year 1960, El Paso reestimated the reserves in the San Juan Basin. As a result of that reestimation, the reserves in the Picture Cliffs, in Mesa [fol. 454-329] Verde Fields, were decreased, and the reserves in the basin of Dakota were increased. The net change was approximately 4 trillion cubic feet.

Q. Does that reflect the change Mr. Boyd referred to in his testimony from different methods of measurement?

A. Yes.

Q. What were the different methods of measurement from and to which the changes were made?

A. Prior to the end of 1960, the reserve estimates were based on the volumetric method. As of the end of 1960 the reserve estimates were based upon field performance.

Q. Did field performance constitute the basis for all the estimates, for estimated reserves that appear in your chart?

A. Yes, but there were further revisions.

Q. By whom?

A. By El Paso.

Q. I direct your attention now to the increase between the years 1962 and 1963 of the estimated gas reserves in the San Juan Basin of the merged company. Are you able to supply a basis for that increase?

A. Yes. El Paso added substantial reserves under gas purchase contracts during the year 1963. About 1,347 trillion cubic feet of Dakota gas was added during that year, and 888.8 billion cubic feet of Mesa Verde gas.

Q. In relation to the Pictured Cliffs and Mesa Verde [fol. 454-330] reservoirs, where is the Dakota Reservoir located?

A. It underlies the Pictured Cliffs and the Mesa Verde Reservoirs in the same general area of the San Juan Basin.

Q. How much Dakota reserves did El Paso have dedicated to it by the end of 1963?

A. Approximately 4 trillion cubic feet.

Mr. Harrison: I didn't hear the answer.

The Witness: Approximately 4 trillion cubic feet, sir.

Mr. Lipson: Would the clerk mark the next document, please?

(Plaintiff's Exhibit No. 15 was thereupon marked for identification.)

By Mr. Lipson:

Q. Mr. Hess, I show you a copy of Plaintiff's Exhibit No. 15 for identification and ask you if you recognize that document.

A. Yes.

Q. Did you prepare that document?

A. I did.

Q. Does it purport to show the estimated gas reserves in the San Juan Basin area 1959 through 1963 in billions of cubic feet between—estimated reserves of New Company and El Paso?

A. Yes.

Q. What were the sources that were used in compiling this information?

[fol. 454-331] A. These data were compiled from sheets entitled, "Quantitative Reconciliation of Gas Reserves of New Company, San Juan Basin, and Quantitative Reconciliation of Gas Reserves of El Paso Natural Gas Company

San Juan Basin." Those sheets were supplied to me and I believe are included in an exhibit marked as Exhibit No. 6, as Plaintiff's Exhibit 6, yesterday.

Mr. Lipson: Your Honor, I offer Plaintiff's Exhibit No. 15.

The Court: Any objections to Exhibit 15?

Mr. Harrison: Well, if I may have the same objection as before. I prefer not to interrupt.

The Court: Overruled. Received.

(Plaintiff's Exhibit No. 15 was thereupon received in evidence.)

By Mr. Lipson:

Q. Would you explain the differences in the figures between this Plaintiff's Exhibit 15 and the previous exhibit No. 14?

A. Yes. I should point out that the two columns on Exhibit 15 do not total the same as is shown on Exhibit 14. El Paso in compiling their quantitative reconciliation of gas reserves had excluded the sale in the Aneth area that was included in the annual report as a San Juan Basin area reserve, and was consequently picked up in the figures that I compiled for Exhibit 14.

Mr. Lipson: Your Honor, I wish to draw the Court's [fol. 454-332] attention to certain figures connected with Plaintiff's Exhibit No. 15. As of December 31, 1959, the estimated reserves in the San Juan Basin area attributable to New Company are 4,756.7 billion cubic feet, and those attributable to El Paso are 12,521.9 billion cubic feet.

I will for the convenience of the Court skip the years 1960, 1961, and 1962 and refer to the last year of the table, 1963. In that case the estimated reserves in San Juan for New Company are 2,518.1 billion cubic feet, to El Paso's 12,285.0 billion cubic feet.

Would the clerk mark the next one, please?

(Plaintiff's Exhibit No. 16 was thereupon marked for identification.)

By Mr. Lipson:

Q. I show you Government's Exhibit marked No. 16 for identification and ask you if you were responsible for the preparation of this document, Mr. Hess.

A. Yes.

Q. Does this exhibit purport to show a percentage division of estimated gas reserves in the San Juan Basin area 1959-1963?

A. Yes. This tabulation is merely the percentage relationship of the volumes shown on Exhibit 15.

Q. The same sources were used to draw this?

A. Yes. This tabulation was actually calculated from the figures shown on Plaintiff's Exhibit 15.

[fol. 454-333] Mr. Lipson: I offer Plaintiff's Exhibit No. 16, your Honor.

The Court: I suppose you want this handled the same way? Overruled and received.

(Plaintiff's Exhibit No. 16 was thereupon received in evidence.)

Mr. Lipson: I wish to draw to the Court's attention certain of the percentage figures here. I think they will be particularly interesting. This all deals, your Honor, with the San Juan Basin. The per cent of estimated reserves of New Company as of December 31, 1959, 27.53 per cent, and of El Paso 72.47 per cent as of the next year, December 31, 1960, the percentages were 24.81 per cent for New Company to 75.19 per cent for El Paso. As of the end of the next year, 1961, the percentages are 24.70 per cent for New Company and 75.30 per cent for El Paso. The next year, the end of 1962, your Honor, the figures are 23.80 per cent for New Company and 76.20 per cent for El Paso.

And for December 31, 1963, the figures are 17.01 per cent for New Company to 82.99 per cent for El Paso.

Would the clerk mark the next exhibit?

(Plaintiff's Exhibit No. 17 was thereupon marked for identification.)

By Mr. Lipson:

Q. Mr. Hess, I show you Plaintiff's Exhibit marked No. 17 for identification and ask you if you prepared this [fol. 454-334] document.

A. Yes.

Q. Does it purport to show the estimated gas reserves excluding San Juan Basin area for Pacific Northwest in 1959 and for the El Paso Northwest Division 1960 through 1963?

A. Yes.

Q. In billions of cubic feet?

A. Yes, sir.

Q. What sources did you use in drawing this information?

A. This information came from the annual report through the Federal Power Commission of Pacific Northwest Pipeline Corporation for the year ended December 31, 1959, and of El Paso Natural Gas Company for the years ended December 31, 1959, through 1963.

Mr. Lipson: I offer Plaintiff's Exhibit No. 17, your Honor.

Mr. Harrison: Same objection.

The Court: Overruled. Received.

(The document marked Plaintiff's Exhibit No. 17 was thereupon received in evidence.)

Mr. Lipson: I wish to draw your Honor's attention to an item on Plaintiff's Exhibit No. 17, that in the years 1959 and 1960 the annual reports, which serve as the basis for this exhibit, the estimated reserves for the Pacific

Northwest Company and for the Northwest Division of El [fol. 454-335] Paso in respective years—included at that time for each of those two years—well, in the first of those two years included 731.2 billion cubic feet for the purchase of gas from West Coast Transmission Company at Kings Gate, British Columbia.

By Mr. Lipson:

Q. What was the Pacific Northwest Company's percentage share of the combined San Juan gas reserves as of the merger date, Mr. Hess?

A. In terms of reserves as they were then estimated and reported in the annual reports, that is shown on Plaintiff's Exhibit 16 to be 27.53 per cent.

Q. And under the El Paso divestiture plan what percentage of the combined San Juan gas reserves at 1/1/64 would New Company receive?

A. In terms of the reserve estimates as of that date, New Company would receive 17 per cent of the total San Juan reserves.

Q. Under the El Paso divestiture plan would New Company be participating in the Dakota reserves that had been developed after the merger date; that is, after December 31, 1959?

Mr. Harrison: Well, I object to the question. There's no evidence here that those are identical.

The Court: Well, what he's asking is whether or not New Company is going to share in any of the Dakota—

Mr. Harrison: Well, if he says that, I understand that, your Honor. I question whether the witness can testify—[fol. 454-336] The Court: —reserves which were acquired by El Paso after December 31, 1959.

Mr. Harrison: That clears the question up.

The Court: Go ahead.

By Mr. Lipson:

Q. Would you answer the question, please?

A. Only to a slight extent; namely, by which reserves were added under supplements to a contract the Pacific Northwest had at the time of the merger.

Mr. Harrison: I ask that it be read? I couldn't hear the answer.

(Answer read.)

Mr. Harrison: All right.

By Mr. Lipson:

Q. Will the New Company have any substantial amount of additional gas reserves over that which Pacific Northwest had on December 31, 1959, in the area north of Ignacio?

Mr. Harrison: I submit that that calls for a conclusion of the witness upon a matter which is totally immaterial. I don't know what "substantial" is, your Honor.

The Court: Read the question, Mr. Hubbard.

(Question read.)

Mr. Harrison: The testimony is here as to what that is. The testimony is in evidence physically what it is. This man's opinion of whether it's big or little is totally immaterial.

[fol. 454-337] Mr. Lipson: I can rephrase the question, your Honor, if that is Mr. Harrison's problem.

The Court: Suppose you do.

By Mr. Lipson:

Q. How much, if any, additional gas reserves over the amount Pacific Northwest had on December 31, 1959, will the New Company have in the area north of Ignacio?

Mr. Harrison: I object to the question. No foundation laid. I submit there's substantial evidence already here as

to the reserves which are north of this area. This witness has shown no competency to testify concerning reserves other than what he's derived from the books.

Mr. Lipson: With respect to that, your Honor, the witness has already testified that he has made examination of a substantial number of public records on file with the Federal Power Commission, including the El Paso annual reports filed with the Federal Power Commission for all of the relevant years. He has also testified that he has been in contact and received figures and tabulations from El Paso itself. It certainly appears he is competent to offer testimony on this question.

Mr. Harrison: If your Honor please, the Exhibit A or 1, whichever it is, defines the properties to be transferred. Now, the question is whether in the opinion of this witness they are substantial or not. And they're here.

Mr. Lipson: The question was rephrased to eliminate [fol. 454-338] the word "substantial," if that was Mr. Harrison's objection.

Mr. Harrison: Well, the properties are all described here. Now, if the witness knows these properties and has the capacity to answer the question, and if he knows where they are and what they are and what gas reserves they are—he has to qualify himself to answer a question of this sort. There's no question but what we're going to transfer. It's in the record.

Mr. Lipson: Your Honor, the record to which I understand counsel is referring, Defendant's Exhibit A, while listing the amount intended to be transferred to New Company as of 1/1/64, it does not purport to list the amount that Pacific Northwest had on December 31, 1964, in the area north of Ignacio. This is the information that I'm attempting to derive from the witness, your Honor.

Mr. Harrison: Well, if he wants to identify the properties of Pacific Northwest from the record, I thought he had already done it; but if he wishes to identify it in the record, that's another matter. But he has no personal knowledge of these matters.

Mr. Lipson: The witness has made a study of the statistical information available from the Power Commission sources.

The Court: What you're doing is having him tell you what he read in the document. Right?

[fol. 454-339] Mr. Lipson: What he derived from his study, your Honor, yes, sir.

The Court: Well, he just read some documents, didn't he?

Mr. Lipson: Your Honor, as I note, these documents are in large part documents supplied by El Paso itself. Hence, they would constitute in a legal sense admissions. Second, your Honor, these are required—

The Court: They may very well be admissible. The documents may very well be admissible. What you're doing—this is all hearsay, and it isn't the best evidence.

Mr. Lipson: Your Honor, the documents themselves are of inordinate bulk. They are available here for counsel to check in case there's any problem about the figures. We have offered them to counsel.

[fol. 454-340] The Court: The difficulties of proof do not make an exception to the hearsay rule nor to the best evidence rule. I don't know how—

Mr. Lipson: The underlying data is available for counsel to check if he desires.

Mr. Harrison: Of course, the trouble is that an unqualified man can get up here and make an unqualified statement on the stand, and we are put to the burden of digging around in all the records to try to prove that his hearsay is incorrect.

Mr. Lipson: I will submit, your Honor, that Mr. Hess is certainly not an unqualified man.

The Court: Well, there is no argument about that. He has all kinds of qualifications, but that doesn't create an exception to the rules of evidence.

Mr. Harrison's problem is that if I let this man testify on hearsay testimony—it is worse than that; it is telling what is in some documents which are available—that is contrary to the best evidence rule. It doesn't make any

difference how expert he is, how well qualified he is, they are entitled to have the documents produced.

Now, if the documents are produced, Mr. Harrison can meet your position, but if I let him testify to what he claims to have derived from a study of those sources, then Mr. Harrison is going to have to have his staff go hunt [fol. 454-341] up those documents to find out whether what he tells you is correct or not. I don't think that is the proper way to proceed.

Mr. Lipson: May I address myself—

The Court: If you want to put on your case, I think you are going to have to do it in accordance with a few rules of evidence that I apply here. You have tried a couple of times to do this now. Both times I have stopped you, and now here we are again. It is the same thing.

Mr. Harrison: What I would suggest, may it please the Court, if counsel will tell me what he is driving at and what he is trying to prove, and it is a fact, we will admit it.

The Court: I don't think you are going to admit what he is driving at.

Mr. Harrison: Okay.

Mr. Lipson: Your Honor, with respect to the point that you mentioned, the material upon which Mr. Hess' studies are based is available for counsel to look at here. His staff will not have to go up to the Power Commission to dig it up.

The Court: If they are available, why don't you produce them and offer them in the regular way. There is a proper and an improper way to proceed. Without throwing any rocks at the administrative proceedings in the Federal Power Commission, for example, they allow all kinds of things, you know, in these administrative hearings. But [fol. 454-342] you are in a Federal district court now, and we have some rules of evidence, not many. They are simple. And one of the simplest of all is that if you are trying to prove the contents of a document, you have to produce it, and you can't put an expert on and say, "Did you read all those things down at the patent office?"

"Yes, I read them all."

"Well, what did they say?"

Or, if you don't want to be that bold about it, you say, "What information did you derive from your studies?"

That is the way you have been putting the question.

Well, you are just asking him to read those documents to you. I think you are obliged to produce the documents.

The objection will be sustained.

Mr. Lipson: Thank you, your Honor.

By Mr. Lipson:

Q. Mr. Hess, if additional gas reserves were to be—

Mr. Harrison: I don't quite hear.

By Mr. Lipson:

Q. If additional gas reserves were to be divested to New Company under this divestiture program, what effect would that have on New Company's exploration and development costs?

Mr. Harrison: Your Honor, this is pure speculation. The man hasn't qualified himself as to matters of exploration and management of the New Company.

[fol. 454-343] The Court: Read it, Miss Reporter.

(Question read.)

Mr. Harrison: If your Honor please—

The Court: It wouldn't have to go for those reserves, and I suppose that would eliminate that exploration cost. But, my goodness, that is certainly conjectural, that is certainly conjectural. What the New Company management will want to do by way of pursuing some more exploration is up to the—what is not yet even leave in the eye of the Court. This is a long way ahead, highly conjectural, remote. I didn't hear any objection, but I will sustain it.

By Mr. Lipson:

Q. Mr. Hess, as a matter of pipeline economics would a divestiture of additional gas reserves have any effect on New Company's ability to bargain for additional reserves and ability to expand to new markets?

Mr. Harrison: Same objection.

The Court: Same ruling.

Mr. Lipson: Your Honor, I would offer to prove through the witness the New Company would, as a result, be in a better bargaining position with a purchase of additional gas and would be better able to expand its system to serve new markets.

The Court: I suppose you want to object to the offer of proof.

Mr. Harrison: I object.

[fol. 454-344] The Court: Sustained.

Mr. Lipson: I have no further questions at this time of this witness, your Honor.

Cross examination.

By Mr. Harrison:

Q. Exhibit No. 15, do you have it there before you, Mr. Hess?

A. Yes, sir.

Q. As I understand this it says, "Estimated gas reserves in San Juan Basin." Then it says, "New Company" and "El Paso," and the first year is 1959. I don't quite understand the "New Company" in 1959.

A. Mr. Harrison, that is the way El Paso supplied the information. It was a quantitative reconciliation or breakdown of the reserve shown in the annual report to the Federal Power Commission between what will be divested to the New Company and what will be retained by El Paso.

Q. Well, maybe that explains it. I still don't understand it. Is it the same thing as what had belonged to Pacific Northwest at that time?

A. As of December 31, 1959 it would be, yes.

Q. So that we could substitute "Pacific Northwest" for the "New Company" during that year?

A. As of that one date, yes.

The Court: Well, you are going to get us all confused [fol. 454-345] now.

Mr. Harrison: I am sorry, your Honor.

The Court: Well, I started out confused. You didn't do it, but you are not helping me out any. I don't know what they mean.

Mr. Harrison: Well, would you please pass Exhibit 15 up to the Court, Mr. Clerk.

The Court: There wasn't any New Company.

The Witness: I understand.

The Court: On that date, 1959. And there wasn't any Pacific Northwest Gas Company either on that date, in 1959.

Mr. Harrison: Yes, there was, your Honor. That is a subsidiary until December 31, 1959.

The Court: That is, after the merger you had it as a subsidiary?

Mr. Harrison: No. The merger was on January 31, '59. Before that they had held stock. From 1957 to 1959 El Paso held the stock.

The Court: All right. What are you talking about there? Let me see that. What are you asking about there?

Mr. Harrison: I am trying to find out whether this 1959—44, 736.7 estimated reserves, when he referred to New Company, simply means Pacific Northwest.

The Court: Well, the document is entitled, "Estimated [fol. 454-346] Gas Reserves in the San Juan Basin Area, '59 to '63."

The first date is December 31, 1959, "Estimated Reserves, New Company."

Well, now, there wasn't any New Company.

One column, "New Company," and the next column, "El Paso."

Now, on December 31, 1959, as Mr. Harrison just explained, there was—still was—a Pacific Northwest Pipeline Corporation in existence. El Paso held all its voting common stock. When you say "New Company," are you talking about the Pacific Northwest Pipeline Company?

The Witness: In this case, your Honor, it would be the same, but what this tabulation represents is a breakdown of the reserve estimates as of that time between what would now go to New Company and what will now be retained by El Paso.

The Court: I don't understand that.

Mr. Harrison: I don't either, your Honor.

The Court: I don't understand that. As of the date of the divestiture, whenever that takes place, there are some reserves that are going to be turned over to New Company.

The Witness: Yes, your Honor.

The Court: Right?

The Witness: Yes.

[fol. 454-347] The Court: Now, does this 4,756.7 billion cubic feet refer to what we are proposing to turn over—El Paso is proposing to turn over to the New Company?

The Witness: Your Honor, that is the reserve estimate as of December 31, 1959 applicable to the contracts, the leaseholds, that El Paso proposes to turn over to the New Company.

By Mr. Harrison:

Q. Well, turning to the column in Exhibit 15, "El Paso Estimated Reserves," I notice that it increases between 1960 to 1963 to a considerable extent. Did you make any analysis of the source of those increased reserves?

A. I made an analysis of the work sheets supplied by El Paso, which gives the reason in some cases as to the increase.

Q. Well, did you examine the basic document to ascertain whether these additional reserves, in whole or in part, came

from contracts of considerable earlier date or from acreage that belonged to El Paso?

A. Not specifically for the preparation of that document, Mr. Harrison, but I have made such inquiry, yes.

Q. I see. So you are able to determine from your investigation, let us say, how much reserves were added by El Paso in the San Juan Basin during this period from acreage which it owned prior to that time?

A. Which El Paso owned?

Q. Owned prior to that time.

[fol. 454-348] A. No.

Q. Or options which it held prior to that time?

A. The figure that I have from El Paso is the opposite, the figure that was added under contracts or acreage entered into subsequent to that.

Q. What I am trying to find out, Mr. Hess, is the basis of this document and your knowledge. I say, you have no knowledge to what extent any of the increased reserves in the San Juan Basin were acquired by El Paso under contracts or upon acreage held or owned prior to 1959?

A. Yes. I know it was approximately—

Q. What acreage did it own prior to 1959 in the San Juan Basin?

A. I can't name the acreage.

Mr. Lipson: May I object to this, your Honor?

The Court: I will tell you what I am going to do. I have got to go out and hold a little conference with a fellow for about five minutes, and I think it might be fruitful if you fellows talked to the witness and got yourselves squared off. Then maybe you can straighten me out on it. I will be back in just a minute.

(Recess had.)

[fol. 454-349] Mr. Harrison: I think I understand it now, your Honor.

By Mr. Harrison:

Q. Mr. Hess, looking at Exhibit No. 15, "New Company" really means the old Pacific Northwest?

A. Yes, sir.

Q. And that was upon what basis that your reserves were determined?

A. The reserve estimates for both Pacific Northwest and El Paso on this tabulation would be the volumetric method.

Q. Now, after that they changed this method?

A. Yes, sir.

Q. So that the figure 4734.7 is not comparable to the other figures?

A. Those are on volumetric, and the others are on a performance.

Q. And they're not comparable?

A. And in that respect they are not comparable.

Mr. Harrison: I have no further questions.

The Court: Do you have any further questions of this witness?

Mr. Lipson: No, sir.

The Court: I don't think we ought to start another witness. The hour is late. I suppose some of you want to catch a plane.

Mr. Lipson: With respect to Mr. Hess, the witness may be excused from the subpoena.

[fol. 454-350] The Court: All right. Now, the understanding I have regularly about this sort of thing is that if you folks want to agree to excuse him, that's all right with me; but if it becomes necessary for you to get him back, I won't postpone the proceeding to let you do it. If you want to dismiss him with that understanding, why, that's all right with me.

Mr. Lipson: The Government is willing—

The Court: All right. You're excused.

The Witness: Thank you, your Honor.

The Court: Now, when do you want to come in here again?

Mr. Williams: Your Honor, we'd like to finish the evidence as soon as possible. The other proceedings we would think probably a week would be very helpful. It would give the defendants an opportunity to work on a reply brief, which I assume they would want to do, and digest what's going on.

The Court: Yes. Mr. Brennan, I have a rule day Monday, don't I?

The Clerk: Yes, sir.

The Court: All right. I'll see you folks at 10 a.m. Tuesday morning. I'll have another matter on Monday, but we'll be ready for you Tuesday morning at 10:00. Is that all right?

Mr. Harrison: Yes.

[fol. 454-351] Mr. Williams: Judge, if it's agreeable with the other parties, since we will not be able to be heard until Tuesday, maybe we could come back a week, the following Monday, if that would be agreeable, and finish this and go into these other matters, too.

The Court: No, I don't want to do that. I just want to go along with this thing as rapidly as we can, while I have the thing fresh in my mind and while we've got the show on the road. I don't want to stop and forget the thing.

Now, of course, if there's any problem anybody has about getting back or staying here, I'm going to help you out on it. My notion is we're going to be here for a little while. But as we go along, the Court will accommodate you in any way that you desire, either side. Of course, I don't want any very long postponements. We'll let you off on Christmas Day.

(Whereupon Court was adjourned until Tuesday morning, December 8, 1964 at 10:00 a.m.)

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[fol. 454-352]

Transcript of Proceedings—December 8, 1964

Appearances

Mr. Thurman: Good morning, your Honor. I have a couple of admissions I would like to make. Mr. Harkaway and Mr. Murphy. Your Honor, I have Mr. William L. Harkaway on my immediate left. Mr. Harkaway is a member of the bar of New Hampshire, Massachusetts and the United States Supreme Court. He is trial attorney with the Federal Power Commission, and is here today representing the Federal Power Commission, and I move his admission for the purpose of this case only.

The Court: Granted.

Mr. Thurman: And to his immediate left is Mr. John T. Murphy. Mr. Murphy is a member of the Supreme Court of California and has been admitted to practice before the Ninth Circuit Court of Appeals of the Federal system. Mr. Murphy represents the Public Utilities Commission of the state of California, and I move his admission to practice before this Court for the purpose of this case only.

The Court: Granted.

Mr. Bennett: Your Honor, may I be heard?

The Court: Yes.

Mr. Bennett: Thank you, your Honor. May it please the Court, I have filed today a document entitled, "A request Upon the Ruling of the State of California to Intervene," which is brief and simply asks that your Honor [fol. 454-353] rule upon it, and I would hope would grant it, or, in the alternative, that the proceedings be stayed pending a ruling upon our petition.

That is all I have to say, your Honor.

Denial of Applications for Leave to Intervene, etc.

The Court: I will have something to say. All right, Gentlemen, the applications for leave to intervene made on behalf of the State of Oregon, State of Washington, State

of Idaho, Washington Natural Gas Company, the Washington Water Power Company, the State of California, the Public Service Commission of Wyoming, the Southwest Gas Corporation, the Public Service Commission of the State of Utah, the Nevada Public Service Commission, Cascade Natural Gas Corporation, Intermountain Gas Company; and the motion to intervene made on behalf of the Northwest Natural Gas Company, the Mountain Fuel Supply Company, the Utah Gas Service Company, the Southern California Gas Company, and the Southern Counties Gas Company of California, and the Public Utilities Commission of the State of California, the Pacific Gas and Electric Company are denied.

There will be forthcoming very shortly a short memorandum and an order which will go into the file. The application to intervene made on behalf of the Paradox Production Corporation, the Washington Utilities and Transportation Company are also denied, and likewise the amendment to those applications for leave to intervene, that is, [fol. 454-354] to appear as amicus curiae, are likewise denied.

All right, you may proceed.

I guess that answers the question posed to me this morning.

Go ahead.

Mr. Lipson: May it please the Court, at the end of Friday's session there was some discussion with respect to Defendants' Exhibit marked J, specifically those parts of it that struck out certain contracts. At that session the Government asked for the underlying contracts that would tend to establish whether or not there were prior options or other kinds of strings associated to justify the strike-outs. Over the weekend Mr. Najaiko of El Paso—

The Court: I wonder if I might interrupt you one moment. There was one motion made this morning by Mr. Bennett that I didn't deal with, and that is the motion to stay the proceedings. That is denied.

[fol. 454-355]

COLLOQUY RE OFFERS IN EVIDENCE

Mr. Lipson: May it please the Court, the contracts referred to were delivered to Government counsel Sunday by Mr. Najaiko of the El Paso staff, and I would move their admission, offer them.

The Court: Any objection? I think maybe you'd better show those to counsel.

Mr. Harrison: It's an enormous bundle. I've never seen them, Mr. Lipson.

I can see it's obviously impossible for me to examine them, just because of their enormous bulk. I'd like to know what the purpose is.

The Court: What is this?

Mr. Lipson: Your Honor, you recall that the defendant submitted certain sheets which purported to amend information previously supplied to the Government, which has gone into evidence as Government's Exhibit No. 3. The amendment supplied by the defendants is marked and I believe was admitted as Defendant's Exhibit J, and I refer Defendant's Exhibit J to your Honor. A number of the items, which refer to substantial amounts of gas reserves that would come under lease sales arrangements, have been stricken from the original exhibit, Government Exhibit 3.

In examining Mr. Boyd on the basis for these strikeouts, the transcript indicates that he referred to certain underlying agreements as justifying El Paso to make these [fol. 454-356] strikeouts. At that time we requested that these underlying agreements be presented in order to determine whether or not Mr. Boyd's conclusions were legal conclusions or were arguable on any other ground.

It's my understanding that the documents in the exhibit just produced by the Government are precisely those documents we refer to. They were delivered by the El Paso staff yesterday to Government counsel. They are in precisely the same form as they were delivered.

Mr. Harrison: Let me understand, counsel. These enormous files of documents, do they relate only to those items —this is Government's Exhibit 3, isn't it?

Mr. Lipson: No. This is Defendant's Exhibit J that you are referring to.

Mr. Harrison: Oh, yes. I see. You didn't offer it. You didn't offer and I offered it; is that right?

Mr. Lipson: I don't recall, Mr. Harrison.

Mr. Harrison: Now, the documents you are now offering purport to relate only to those matters which represent strikeouts in the exhibit?

Mr. Lipson: The documents that we asked for, your Honor, were only with respect to those items that were stricken, and I assume that those were the documents that were given to us.

Mr. Harrison: Well, I'm still a little at a loss to know [fol. 454-357] just what the offer is for.

Mr. Lipson: These are El Paso contracts to justify the El Paso summary which is basically Defendant's Exhibit J.

Mr. Harrison: Are these contended to be in any way inconsistent with the exhibit?

Mr. Lipson: Well, I'd rather save my contention for argument.

The Court: This is the hour of truth. Tell us what you have in mind.

Mr. Lipson: Yes, sir.

The Court: We're not saving anything in this case.

Mr. Lipson: The contract that is numbered 11 in the collection that has just been identified as Government Exhibit 18 is an agreement relating to a similar numbered strikeout on the Defendant's Exhibit J. That agreement, from our examination, your Honor, shows that there was in fact no option, that there was only an amendment of an existing agreement which covered additional acreage; but there was no underlying option as such. Furthermore, the agreements that we have been given specifically exclude

anything below the Pictured Cliffs formations in the San Juan Basin. And therefore they do not relate to the Mesa Verde formations and to the Dakota reserves, which are shown on Defendant's Exhibit J.

If your Honor would like me to continue, I can do so.

[fol. 454-358] Mr. Harrison: I'm still at a loss to know, without having read it, I still don't know what counsel is trying to prove. Whether it is or is not what you describe, I don't know what it has to do with the case.

Mr. Lipson: Your Honor, if I may summarize the testimony on the record as I understand it, perhaps I may clear this matter up somewhat.

Mr. Boyd presented—strike that, please. The Government presented its exhibit No. 3, which was an El Paso production that summarized many, many contracts entered into by El Paso from January 1, '57, to a current date, which I believe would be in September of this year. Those contracts separated out the gas supplies that were acquired from 1/1/57 on behalf of El Paso and those acquired on behalf of Pacific Northwest in those intervening months.

Subsequently, after Plaintiff's Exhibit No. 3 was introduced in order to show I believe that the Government's exhibit tended to overstate the amount of gas that El Paso acquired in the intervening years on its own behalf, we were supplied with what is now Defendant's Exhibit J. Defendant's Exhibit J is a copy of several of the pages that appeared in Plaintiff's Exhibit No. 3, with this addition, and that is several of the items were deleted, a line was drawn through them, and these were deleted from the total. The effect is to delete from the total amount of reserves that El Paso acquired on its own behalf for itself [fol. 454-359] during those intervening years, 1/1/57 through approximately September of 1964.

Mr. Boyd was examined as to the basis for omitting these contracts, and this revision of what was Plaintiff's Exhibit No. 3 and what is now Defendant's Exhibit J.

It is my understanding that Mr. Boyd testified at that time that the reason why a number of these items were

stricken out was that El Paso had a string on these items that dated back to a period before January, 1957. In some cases an option. In some cases, as the record will establish—I won't purport to try and summarize the entire record of Mr. Boyd's testimony—other arrangements.

We at that time asked Mr. Boyd to supply to us the underlying options or other agreements that would tend to show that there was in fact a string on these reserves, and some of these were quite substantial, that would bring them into the period prior to January, 1957.

Now, it is my understanding that the contracts supplied by Mr. Najaiko and which are contained in Plaintiff's Exhibit No. 18 are precisely those contracts that the Government requested from Mr. Boyd when he was on the stand; and if I understand correctly, they would purport to either —strike the word "purport"—they would either support or deny the contentions made by Mr. Boyd that there was in fact a string on these reserves that would bring them back into the period prior to January 1, 1957.

[fol. 454-360] Mr. Harrison: Well, as I understand it, the question is not whether these were reserves that belonged to Pacific Northwest, but simply when the right which El Paso acquired arose, whether it be before or after the *1937* date, which I assume is immaterial. But apart from that, may it please the Court, I don't see any use in burdening the record with these enormous files, unless they do contradict Mr. Boyd's testimony. Just to put in a bunch of papers and say, "I think some of them support them, and some of them don't," and we have to weed them out, I don't think that's quite fair to counsel or the Court.

The Court: Well, Mr. Harrison, as I understand counsel, Mr. Boyd's testimony was general. This is specific. The Government's contention is that there was a root of interest or ownership back at a time when—in Pacific Northwest—back before the time that's mentioned. And that's not on which to base some conclusions in this lawsuit.

Mr. Harrison: I didn't understand counsel that way. If that's his contention—

The Court: That's your contention, is it?

Mr. Lipson: That is my contention basically; but I think that you reversed the position of the parties. I understand that it's El Paso's contention that there was a root that predated January 1, 1957.

[fol. 454-361] The Court: Well, either way I think we've got to look at the documents. I don't see how we're going to get away from that. They're received.

(The document marked Plaintiff's Exhibit 18 was thereupon received in evidence.)

Mr. Lipson: Thank you, your Honor. The Government calls as its next witness, your Honor, Mr. Roy Riggs.

Roy B. Riggs, Jr., called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Lipson:

Q. Will you state your name and position, please?

A. My name is Roy B. Riggs, Jr. I'm a petroleum engineer with the consulting engineering firm of James A. Lewis Engineering, Inc.

Q. Where are they located?

A. Their business address is 1700 Fidelity Union Tower, Dallas, Texas.

Q. What position do you hold in the firm?

A. I am a petroleum engineer and also hold the position of vice president in this firm.

Q. What is the size of the James A. Lewis firm?

A. We have approximately 180 to 190 employees. Of these, 30 to 35 are technical employees, such as petroleum [fol. 454-362] engineers and geologists.

Q. Will you describe your duties with the Lewis Engineering firm?

A. One of the principal services that our firm offers is that of determination of reserves and economic valuations of oil and gas properties. Now, in this behalf, under my own undertaking and as supervision of our other engineers and statisticians and the like, make these reserve and economic valuation studies.

Q. Would you describe the nature of any studies that you conducted for the Lewis Engineering firm, with special reference to any studies regarding the San Juan Basin?

A. During the four years that I have been employed by Lewis Engineering, I have personally done valuations on a number of San Juan Basin properties and all of the reservoirs. I have been in charge of total company valuation of several producers in this field, such as Aztec Oil & Gas Company, Pubco Petroleum Corporation, and several others.

Q. Did these studies include studies of reserves in San Juan?

A. Yes. This is determination of reserves of the properties, of the deliverability of the properties, and economic valuation of these properties.

Q. Prior to your employment with the Lewis Engineering firm, with whom were you employed, and what were the nature of your duties?

[fol. 454-363] A. For a twelve-year period prior to my work with Lewis Engineering, I was employed by Humble Oil and Refining Company as a petroleum engineer. During that time I had assignments in reservoir and production engineering over a number of positions in that company. At one time I instructed in their petroleum reservoir engineering school. Just immediately prior to my work with Lewis Engineering, my position was supervising district engineer there in their Abilene, Texas, district.

Q. Where did you receive your engineering schooling, Mr. Riggs?

A. I received a bachelor of science degree in mechanical engineering from Texas A & M in 1948.

Q. Are you a registered professional engineer?

A. Yes, I am a registered professional engineer in the State of Texas since 1953.

[fol. 454-364] Q. Are you a member of any professional societies?

A. Yes. I am a member of the Society of Petroleum Engineers of the American Institute of Mining and Metallurgical Engineers.

Q. Have you conducted any recent studies, that is, any recent petroleum engineering studies of the former Pacific Northwest properties located in the San Juan Basin?

A. Yes. I have been in charge of a recent study of reserves and deliverability for the former Pacific Northwest properties in the Mesa Verde Horizon in the San Juan Basin.

Q. What was the source of the basic material that you relied on in making these studies?

A. Our basic information was from the public records of the New Mexico Oil and Gas Conservation Commission and from the work papers of El Paso Natural Gas Company.

Q. Have you reached any conclusions with respect to the magnitude of the reserves that you studied?

A. Yes. The length of our study was such that, with additional time, there could be refinements. Ours is not an exact science. But the magnitude is such that—or, to state it another way, the size of the reserves and how they may differ from some other estimates that I have seen are substantial, so that the order of magnitude of the answers we received are quite significant.

Q. Have you prepared any chart summarizing your study [fol. 454-365] of the Pacific Northwest reserves in the Mesa Verde reservoir of the San Juan Basin comparing it with the El Paso figures?

A. Yes. I have prepared such a chart.

(Plaintiff's Exhibit No. 19 was thereupon marked for identification.)

By Mr. Lipson:

Q. I show you a document marked Plaintiff's Exhibit 19 and ask you if you can identify that document?

A. Yes. This is the document that I have caused to be prepared.

Q. What sources did you use in drawing Plaintiff's Exhibit 19?

A. On this exhibit, which is a summary of my reserve studies for these former Pacific Northwest properties in the Mesa Verde reservoir of the San Juan Basin, I have listed the results of the independent study of our firm that I just had reference to in the top half of the sheet, and in the bottom half of the sheet I have reproduced the reserves that El Paso Natural Gas Company has assigned to these same properties for comparative purposes.

Now, I might mention at this point that I have, by my own computation, divided the reserve estimates of El Paso Natural Gas into that for the developed acreage and that for the non-developed acreage through work papers that they had furnished me as to location of the properties and stage of development.

[fol. 454-366] Q. How do your reserve estimates compare with El Paso's with respect to the Mesa Verde reserves?

A. The order of magnitude for remaining producible reserves as of January 1, 1964 is, by my estimate, about one trillion cubic feet of reserves and, by the estimate of El Paso, about 1.8 trillion cubic feet of reserves.

Mr. Lipson: Your Honor, I would at this time like to offer Plaintiff's Exhibit No. 19 for identification.

Mr. Harrison: I think I would like to examine the witness before it is admitted, your Honor, based upon the basis of the material.

The Court: This is for identification.

Mr. Harrison: I beg your pardon.

Mr. Lipsen: Your Honor, it is my understanding it has already been identified as 19. I would like to offer 19 into evidence at this time.

The Court: All right, go ahead, Mr. Harrison.

Voir dire examination.

By Mr. Harrison:

Q. Starting out—by the way, when did you commence your study which led up to the preparation of this Exhibit No.—

Mr. Lipsen: Nineteen.

By Mr. Harrison (Continuing):

Q. —19 for identification?

A. If I may refer to my notes, Mr. Harrison.

Q. Yes.

[fol. 454-367] A. It was on the 17th of November of this year, about two weeks ago.

Q. Two weeks ago. And what did you do first—

A. Excuse me. Three weeks ago.

Q. What is the first step you took in obtaining the material which is basic to this exhibit?

A. The first step, of course, was to gather the basic information.

Q. What was that information?

A. This basic information was the accumulation of the shut-in wellhead pressures for each of these gas wells.

Q. Where did you obtain that?

A. I obtained it—it came directly from the files of the New Mexico Conservation Commission.

Q. Do you have those here?

A. I do not have the files here. I would like to elaborate on those if I can. I have information from which I procured this.

Q. May I have the information from which you procured it?

A. These are compilations of reservoir pressure in cumulative gas production for each of the approximately, oh, 800 wells, I think, in the Mesa Verde Horizon, which were the former Pacific Northwest properties.

Q. And how did you identify them as former Pacific Northwest properties?

[fol. 454-368] A. I used these work sheets directly, and the identification, of course, was given to me as being the former Pacific Northwest properties, and then I also received a listing of these properties from the work sheets of El Paso, which I also have if you want to see them.

Q. Where did you obtain these listings from El Paso?

A. I'm sorry, I don't understand the question, Mr. Harrison.

Q. Where did you obtain the listings from El Paso, El Paso's listings?

A. Where did I obtain the listings from El Paso?

Q. Yes.

A. Let's see. On a subsequent date, if I may refer once again—on a subsequent date, according to my notes on November 24.

Q. Yes.

A. I visited with the engineering staff of El Paso in the city of El Paso, Texas, with Mr. Derrick and Mr. Lemon, and others of his staff, and, as I recall, Mr. Lemon gave me this.

Q. What was the information you requested from Mr. Lemon?

A. We requested quite a few items from Mr. Lemon. Would you like to know all of them, Mr. Harrison?

Q. Just enumerate them, that is all.

A. We received from Mr. Lemon the listing of the properties in the Mesa Verde Horizon. And he also furnished us on these work sheets the estimate of El Paso's [fol. 454-369] reserve average for a whole township. They

didn't give it to us by individual wells at that time, although they did in their work papers a little later—a little previous to this. The interest that the New Company would have in each one of these wells by individual wells. And then, moving ahead to another item, they also gave us the basis for their deliverability calculations, their basic work papers by which they had computed the deliverability at the wells, a listing of the new wells that would need to be drilled, some 500 up to some 800, I think, to be able to produce the reserves that is in the plan of divestiture.

Then, as we discussed, prior to Mr. Lemon giving us these—copies of these work papers—then we discussed the basis of their reserve study with two of their other engineers, a Mr. Foy Boyd and a Mr. Fred Bernard, I believe, are the gentlemen's names, two of the engineers on his staff; and these gentlemen read us out of their work papers, and I copied these down in my notes, individual reserve estimates for some—

Q. Perhaps I could shorten this, if I understand the situation. So far as your exhibit here is concerned, did you accept the estimates of El Paso Natural Gas Company with respect to its own reserves in the San Juan Basin?

A. Accept them for what purpose, Mr. Harrison?

Q. In other words—we will put it this way, so my ques-
[fol. 454-370] tion will be clear: Did you adopt the reserve estimates of El Paso Natural Gas Company with respect to its own reserves in the San Juan Basin?

A. I had no reason to adopt their reserves, sir. I made an independent study. I'm sorry, but—I'm not trying to be obtuse, but I don't understand the question.

Q. You were advised by them what their own estimates were of the reserves in the San Juan Basin, were you not?

A. Yes, sir.

Q. And what they assigned to the Pacific Northwest and the Northwest Division and what they assigned to their own division, Southern and Southwest, is that right?

A. Yes.

Q. Not to their own division.

A. We didn't go into that.

Q. You didn't ask them?

A. No, I didn't ask them that question.

Q. You didn't ask them any questions then concerning their estimates of reserves in the San Juan Basin?

A. Oh, yes, yes, I did. I thought I had enumerated that earlier.

Q. Having obtained them, were your conclusions different from the conclusions that they gave you?

A. Oh, yes.

Q. What method did you use in arriving at their [fol. 454-371] reserves? I have heard several methods described here. Are you familiar with the volumetric method?

A. Yes, sir.

Q. I am not familiar with them, but I have heard them mentioned. Do you know them?

A. Yes, sir, I know them.

Q. Will you enumerate the different methods of approach, and I can ask you which one you used.

A. Well, there are a number of—well, basically, in evaluating gas reserves, there is the volumetric and there is the pressure decline.

Q. Which did you use?

A. For my estimate?

Q. Yes.

A. I used the pressure decline.

Q. And you used that pressure decline method and applied them to certain data, first, that you obtained from the New Mexico Commission, is that right?

A. That is correct.

Q. And that applied to your estimate with respect to the—you have here "Total Northwest," "Original Reserve," and "Developed Acreage." What do you mean by "Original Reserve"?

A. That is the ultimate recovery of gas originally in place before the production is subtracted as occurred up to a certain date.

[fol. 454-372] Q. Well, would that mean that that is the reserves as originally estimated when they were acquired?

A. They are currently estimated, Mr. Harrison, as being originally there.

The Court: I don't understand the witness. I don't know what this is: original reserves.

Mr. Harrison: I am trying to find out, your Honor, what "Original Reserves" means.

The Witness: If I may, I will be glad to try to explain that point. In the normal nomenclature of the reservoir engineering in stating of reserves, reserves themselves normally refer to future producible hydrocarbons. In other words, reserves are what are left to be produced. Now—

By Mr. Harrison:

Q. Well, then, would you say here, that "Original Reserves" means the gas left in place as of a given date?

A. The original reserves are the sum of the reserves to be produced plus the gas that has been produced to date. So if you backed up to the point of time before they had been produced, then those would be the original reserves, Mr. Harrison.

Q. That would be the reserves you commenced with, is that right?

A. That is right.

The Court: What would be a nice simple way to say [fol. 454-373] it is that those are the reserves before you used any?

The Witness: Yes, sir, I think that would be a very good way to say it.

Mr. Harrison: I see.

By Mr. Harrison:

Q. When you say, then, "Total Pacific Northwest Original Reserves," you refer to the total reserves which Pa-

cific Northwest Pipeline had before the acquisition by El Paso?

A. Yes, sir, by my current estimate.

Q. I see. Now, you say, "Developed Acreage." When was that developed?

A. That is what is currently developed as of January 1, 1964.

Q. In other words, the undeveloped acreage of 217,251 is acreage that has not yet been developed?

A. That is correct.

Q. At the present time?

A. It is on acreage that has no well on it.

Q. I see. Now, how did you go about estimating the reserves in the undeveloped acreage?

A. I used a method which is commonly accepted in the petroleum industry, if I may say. I simply estimated those reserves on the basis of control from the nearest developed well. As an illustration, if there were a 320-acre undeveloped plot, and next to it, or surrounding it, there were several developed wells, through the pressure decline [fol. 454-374] method you could determine had a certain reserve, then I would give it about the same as those.

Q. Did you visit the area at the time?

A. No, I did not visit the area.

Q. How do you know what the geologic formations are that are not developed? Are you a geologist?

A. I am—by practice, I am, yes, not by degree.

Q. Well, but, doesn't this sort of a study require a visit to the property?

A. No, sir, it does not.

Q. And it doesn't make any difference where the undeveloped acreage is?

A. Oh, yes, it certainly does. It has got to be contingent—it has got to be near the developed acreage.

Q. Anything that is near the developed acreage on the map can be estimated from the map without any examination at all?

A. Truthfully, Mr. Harrison, I was guided somewhat by El Paso's estimate of where production limits of the field were. I didn't use anything outside that, which I understand they also assigned reserves to.

Q. Is this figure for the undeveloped acreage El Paso's figure, not yours, or is it your figure?

A. The location of the acreage is their figure.

Q. That is on the map?

A. Beg pardon?

[fol. 454-375] Q. That is on the map?

A. That is on the map. The estimate of what the value of the reserve to that undeveloped acreage is mine.

Q. You ignored their estimate on that?

A. I didn't use it.

Q. What did you use on the undeveloped acreage apart from its location?

A. Well, if you don't mind me repeating, sir, I used the control from the nearby wells that were developed.

Q. Have you your working papers on that?

A. Yes.

Q. Let me see them.

A. Perhaps a word of explanation would be in order here. This is a tabulation of the properties for the—which, as I understand, El Paso would propose be returned to the New Company by—located systematically by state and by township and range and then by section, just as a matter of convenience in finding them. Then for each one—

Q. Where did you obtain that information?

A. I got this from El Paso. Then from—if I may refer back, they have not, as I understand their work, considered their reserve estimate as broken down into a developed and undeveloped category.

Q. Did they or did they not? I mean, did you rely upon them in this respect?

[fol. 454-376] A. No, not directly. They did furnish me a map that showed the location of all the developed wells.

Q. But you didn't use that?

A. Yes, I used it to the extent that I had to find out which wells were developed and which were not, because, as I understood, their reserves were for whether a well was on the property or not on the property.

Q. What is the difference between a developed and undeveloped well? I don't understand.

A. A developed and undeveloped property, Mr. Harrison, not well.

Q. I thought you said "well." All right, now, you obtained the identification of the undeveloped properties from El Paso, and to that extent you relied upon them?

A. That is correct.

[fol. 454-377] Q. And you rely upon a map of them they gave you?

A. That's correct.

Q. But you did not rely upon any other information they gave you?

A. I used other information they gave me. I observed other information they gave me.

Q. What other information?

A. Well, I don't want to repeat myself, but they gave me the listing of the reserves for each of these properties that I looked at; and they gave me the deliverability calculations for all of the properties, whether they were developed or not; they gave me to some extent individual—

Q. Now, I'm a little bit ignorant. I don't understand what you mean when you say "deliverability of undeveloped properties."

A. Well, that confused me, too, sir. It's just an estimate of what these properties will produce at such time as a well is drilled on it.

Q. But you didn't accept that from them, did you?

A. I made a separate study.

Q. Just tell me, you did not use their estimate? You made an independent estimate?

A. Yes. I made an independent estimate.

Q. Now, I want the basis of the independent estimate. That's what I want the working papers on.

[fol. 454-378] A. All right. For the reserves?

Q. Yes.

A. This is it right here.

Q. All right. You were explaining it?

A. Yes. Now, this particular work sheet has—is the work sheet both for the reserve and the deliverability calculation. So to the extent that this is the reserve work paper, I have the listing of the properties, the interest the Pacific Northwest has in each of these, and then a listing by property—or, by undeveloped property of the reserve assigned to that property.

Q. And that's the reserve you assigned?

A. Yes.

Q. Now, is that all of the working papers that you have on your estimate of the undeveloped acreage?

A. No. I also have this posted to a map. I have the same figures posted to a work map.

Mr. Harrison: May I just consult with an engineer for a second, your Honor, to try and understand this?

The Court: Yes.

(Conference.)

By Mr. Harrison:

Q. Do you have a crusher production curve study, Mr. Riggs?

A. Yes, I have that for the developed wells.

Q. May I have that?

[fol. 454-379] A. I don't have that with me. It's in my office in Dallas.

Q. Well, you took this data from that curve study, didn't you?

A. No. Now, these are for wells that have not yet been drilled. These are the undeveloped wells.

Q. Well, running back once more to what I understand your testimony to be, this estimate that you independently

made is predicated upon the deliverability of wells that are in production; is that right?

A. The reserves of wells that are in production, yes, sir.

Q. Yes. And how did you determine that?

A. I determined that by an extrapolation of the pressure decline for each one of the wells that lent itself to this application. Now, I might mention—

Q. That's what I'm reaching for, isn't it?

A. Yes. Well, I hope it is. I hope I'm telling you what you want to know.

Q. Let's have that. Let's have the extrapolation study.

A. I have the results by individual tracts with me and tabulations. I do not have all of the basic work papers with me. They're in our office in Dallas. We plot these on our IBM computer. I just didn't bring it all with me, but they're available.

Q. Don't you translate that to a curve, the pressure decline?

A. The pressure decline curves is what I do not have with me.

[fol. 454-380] Q. And that's basic to this material that you just gave us, isn't it?

A. Oh, yes.

Q. So we can't check this without that?

A. Oh, no. No. You can't recompute all of my work papers without having all of them here.

Q. Well, without that particular one?

A. That's one of the ones you would need, yes, sir.

Q. And that's not very bulky is it?

A. Well, I'm sorry, but it is. It can be brought here.

Mr. Harrison: Well, I think, if your Honor please, we'd like to have it brought here. We can't check this stuff.

The Court: How bulky is it?

The Witness: Oh, it would all fit together in a large file box.

Mr. Harrison: Not too much bigger than the exhibit we have over here, would it be?

The Witness: Which exhibit is that?

Mr. Harrison: This here. Not too much bigger than that?

The Witness: Oh, yes, quite a big bigger than that. Unfortunately, we didn't make any plots on the small sheets like the El Paso did. We plotted these on our 1401 IBM computer. As it turns out, each one is pretty big.

The Court: All right. You produce, this, whatever it is. [fol. 454-381] What do you call it, Mr. Harrison?

Mr. Harrison: Pressure production decline curves.

The Court: All right.

The Witness: Now, I have pressure—may I understand you correctly? These are not production decline curves. These are pressure decline curves. Just so I'll bring what you want.

By Mr. Harrison:

Q. Well, bring what you have.

A. Everything that I have in my work papers?

Q. Oh, no. If you don't have that which we described—

The Court: Well, I don't know what we're talking about. I don't understand why everybody is having so much difficulty with this. You made a study, did you?

The Witness: Yes, sir.

The Court: We want your work papers.

The Witness: All right, sir.

The Court: All right.

The Witness: May I have the other work papers back?

Mr. Lipson: May we have the work papers? Now, your Honor, I offer Plaintiff's Exhibit No. 19.

Mr. Harrison: I didn't hear you.

OFFER IN EVIDENCE

Mr. Lipson: I offer Plaintiff's Exhibit No. 19.

Mr. Harrison: We're entitled to complete our examination.

The Court: Yes.

[fol. 454-382] Direct examination (cont.).

By Mr. Lipson:

Q. Mr. Riggs, how long a period of time would it take to get the papers counsel has requested from Dallas to this Courthouse?

A. I think I could arrange by telephone to have those put in the mail today. As I understand the air mail service available here—

The Court: You needn't go into that. Just do that, will you? Just phone down there and tell them to get it in the mail today, air mail, up here to the Courthouse, the Clerk's office.

By Mr. Lipson:

Q. Based on your findings as the results of your studies, Mr. Riggs, to what extent has El Paso over-estimated Pacific Northwest Mesa Verde reserves?

Mr. Harrison: I submit that the question is premature.

The Court: Read it, Miss Hallam.

(Question read.)

The Court: All right. Why is it premature?

Mr. Harrison: Because, your Honor please, the exhibit on which he predicates his answer is not yet in evidence, and there's nothing to support that data.

Mr. Lipson: May I respond to that, your Honor? The witness's testimony now is not predicated on the exhibit. [fol. 454-383] It is predicated on a substantial study that he's already testified to that he's undertaken. If Mr. Harrison seeks to challenge the methods involved in this study, of course, he's free to do so.

The Court: Well, I don't understand that. That exhibit is not yet in evidence.

Mr. Lipson: That's right, your Honor.

The Court: And I understood that that exhibit had considerable to do with the question of whether El Paso has overfigured their reserves.

Mr. Lipson: Your Honor, the exhibit does show that. The exhibit in a sense—

The Court: Well then, we ought to have it here before we let this witness conclude something which involves the exhibit.

Mr. Lipson: May I respond, your, Honor? As I understand the witness's testimony—

The Court: Well, I don't understand the witness's testimony. Now, ask him if—I'll ask him. Can you answer the question without reference to your study? And does your study include the exhibit that's been offered here and which has not been received in evidence?

The Witness: My answer would have to be predicated on my study, your Honor.

The Court: Yes. And your study includes that exhibit, [fol. 454-384] doesn't it?

The Witness: Yes. The exhibit came out of my study.

The Court: All right. Now, how are you going to get around that?

Mr. Lipson: The exhibit, as I understand it, your Honor—

The Court: Well, it's premature. I'm not going to let you get any conclusions out of this witness until you get that material up here and we have an opportunity to examine him about it.

Mr. Lipson: If I understand your Honor's ruling, then, I would respectfully request to defer further examination of this witness until the work papers do arrive.

The Court: That's all right. If you want to do that, you go ahead. Any way you want.

Mr. Lipson: I assume Mr. Riggs may step down. You may step down, Mr. Riggs.

The Court: Well, you may need to regroup at this point. So we'll take a brief recess.

Mr. Lipson: Thank you, your Honor.

(Recess taken.)

[fol. 454-385]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: All right, Gentlemen.

Mr. Lipson: May it please the Court, I understand that Mr. Riggs has phoned into his office in Dallas, and that the material requested is going to be delivered sometime this evening.

The Court: Very well.

Mr. Harrison: May we have the privilege of seeing it before we return to court?

Mr. Lipson: I will notify you as soon as they are available.

Mr. Harrison: Will Mr. Riggs be available so Mr. Derrick may discuss it with him?

Mr. Lipson: We will make the material available.

Mr. Harrison: Will you make Mr. Riggs available? We gave him the information, and we would like his assistance.

The Court: Riggs is ordered to stay around here until we get through with him. Is that all right with you, Counsel?

Mr. Lipson: I believe he is under subpoena, yes, sir.

The Court: Well, if he isn't, he is now. Let's keep him.

Mr. Lipson: Your Honor, the Government will now call three witnesses to testify concerning the willingness of each of three companies to acquire New Company for the [fol. 454-386] purpose of competing in California.

The Court: Pardon me. I am so sorry. I couldn't hear what you said.

Mr. Lipson: I will be glad to repeat it, your Honor. The Government will now call three witnesses to testify concerning the willingness of each of three companies to acquire New Company for the purpose of competing in California.

Mr. Harrison: Object to it as premature.

The Court: You mean we are going to have some California companies brought in in this enterprise?

Mr. Lipson: No, sir, your Honor. The companies, as I understand them are, none of them, incorporated in California, but they are interested, among other things, in acquiring the properties to be divested, which constitute what used to be Pacific Northwest and what is described as New Company, to bring gas to California.

The Court: I think prospective purchasers interesting themselves, any and all of them in this proceeding is mighty premature, and I am not going to entertain anything on that subject at this juncture, and perhaps never, because I think this situation can be worked out, and we are far from getting to a place where we throw up our hands and say, "Well, just let it go to pot. Somebody come in and buy it."

I am not interested in that, and I don't want to hear any more about it until much further along in this proceeding. [fol. 454-387] We are going to see what we are going to do. This is not the first case which has been a divestiture, by a long shot, and it will take a little working with it. You fellows are jumping the gun on some proposals, and I think it is entirely premature at this time. I am not interested in California purchasers who think they are going to come up here and buy this property.

Mr. Lipson: Your Honor, may I respectfully—

The Court: Or anybody else, any other purchasers. There are a couple of them sitting in the courtroom. I would suggest that that, at this juncture, looks to me like "Loves Labor Lost." We will entertain that kind of a proposal when we have prospected everything else in detail and at great length and with much patience, whatever time it takes.

All right.

Mr. Lipson: Your Honor, with the Court's permission, may I respectfully observe that one of the principal concerns affecting this divestiture is to establish New Company as an independent entity, independent of El Paso or any other.

The Court: We are way past that point. I have heard a lot about that, and I understand it.

Mr. Lipson: Yes, your Honor.

The Court: You don't need to spell that out to me as though I were still a freshman up at Harvard Law School. [fol. 454-388] I know what you are driving at. Proceed.

Mr. Lipson: I would merely wish to observe that sale of this company is—sale of a company subject to divestiture is a normal manner of settling divestiture suits.

The Court: It isn't the only one.

Mr. Lipson: We don't purport to say it is, your Honor.

The Court: Well, we are pursuing something else. This suggestion may be germane some other time later on, but we are pursuing something else. I want to work out this first, this project.

I am sorry Mr. Rawlings wasn't in here a few minutes ago. Mr. Roberts will tell you about it, Mr. Rawlings.

Mr. Rawlings: Thank you.

The Court: I just paid my respects to your application. All right, go ahead.

Mr. Lipson: Yes, your Honor.

The Court: I want to proceed with the proposal to work this out without the sale to people who have nothing whatever to do with this concern at all. There are a lot of innocent stockholders in this matter. I want to pay some attention to that. All right.

Mr. Lipson: With respect to these third-party applications, your Honor—

[fol. 454-389] The Court: Well, we are not going to talk about those.

Mr. Lipson: Your Honor, may I respectfully request, then, that under the provisions of Rule 43(c) that the Court take and report the evidence in full of the persons who are presently under subpoena, Mr. Peter King, Jr., Mr. Roger Conkling, and Mr. Carson, who will testify in this area.

The Court: Who are they?

Mr. Lipson: Mr. Peter King, Jr.—

The Court: Will testify in what area?

Mr. Lipson: The area of possible third-party—

The Court: No. I am not going to hear that at this juncture. You don't seem to understand me, Counsel. The trial court has a wide discretion in the order of proof, and that is what I am talking about. I don't propose to hear anything about that at this time.

Mr. Lipson: Do I understand your Honor is denying my request under Rule 43(c) at this time?

The Court: I am denying any request you make to go into any subject except the one we are pursuing here, as a matter of the order of proof.

Mr. Lipson: Your Honor, with respect to the order of proof, may I observe that except for the remains of Mr. Riggs' testimony, of course, these are the remaining witnesses that the Government intends to produce. There are [fol. 454-390] no other witnesses.

The Court: That's fine, but we are far from through with this hearing. The manner in which I propose to proceed here is to work out in various details your objection to the El Paso proposal, and we are going to pursue that at very great length before we get to any business of taking testimony on the subject you are talking about. I just don't want to be diverted at this point from the main project before us.

Mr. Lipson: I understand your Honor's statement. May we have the Court's permission to submit a written offer of proof of the testimony of these three gentlemen?

The Court: You won't need to have an offer of proof. In due course we will take your testimony if it becomes important.

Mr. Lipson: Your Honor, may I observe that the three gentlemen named, Mr. King, Mr. Conkling, and Mr. Carson, have many commitments and they are presently under subpoena in this proceeding. Based on your Honor's statement it seems to be an indeterminate date when they will be called upon to testify.

The Court: You know as much about that as I do. We have a lot of work to do in this lawsuit yet, and I mean to pursue one thing at a time, Counsel, and I am not going

to be diverted. As a matter of the order of proof we will [fol. 454-391] not at this time hear your witnesses on that subject.

Mr. Lipson: May I have some indication as to the time when they may conceivably be heard, your Honor?

The Court: That is a foolish question. I haven't the slightest idea in a proceeding of this kind when we might arrive at that time, and you haven't, either. You know more about it than I do. How are we going to tell you when we are going to be able to take that testimony. I am going to pursue something else here first.

Mr. Lipson: I understand your concern, your Honor, about the order of proof, and of the discussions relating to the El Paso proposal. I think that the Government, however, would be remiss if we merely attacked the proposal and proposed nothing that would overcome the burden itself.

The Court: That may be so, Counsel. The Court doesn't want to argue this matter with you. I have made the ruling, and at a proper time and in due course, if that occasion should arise, I will give you an opportunity to put that evidence on, but this is not the time. I don't want to be interrupted in the investigation of the matters we have been investigating. That is what you propose to do, interrupt it. I don't care to hear any more argument. That is the ruling. We will let you put those witnesses on in due course.

Mr. Lipson: As a matter of convenience, may they be relieved from the subpoena pending that decision on your [fol. 454-392] Honor's part?

The Court: I didn't subpoena them. That is up to you. They are your witnesses.

Mr. Lipson: Your Honor, I hope I am not overstepping myself at this time, but may I refer your Honor to a copy of the Rules of Civil Procedure, Rule 43(c)?

The Court: Yes.

Mr. Lipson: May I approach the bench and hand it to your Honor?

The Court: The clerk will hand it up here.

Well, I am quite familiar with that, Counsel. I haven't excluded any of your evidence yet. I have just told you you can't produce it at this point in the trial.

Mr. Lipson: With all respect, your Honor, one of the things the Government is concerned about is that the Supreme Court ordered divestiture without delay, and we think that this information—

The Court: My friend, do you think we have not been proceeding "without delay"?

Mr. Lipson: I think we have been proceeding expeditiously, yes, your Honor.

The Court: And we are going to go on doing it, so don't get yourself excited about that. We will proceed without delay.

Proceed.

[fol. 454-393] Mr. Lipson: Your Honor, perhaps this—at this juncture the Government might explain that with respect to these third parties, just to make its position quite clear and understood, that these third parties, each of them, purport to be qualified, to have adequate financial and other backing, including the ability to operate a natural gas pipeline system, to serve the communities presently served by the Northwest Division, previously served by Pacific Northwest, and, hopefully, hopefully those that will be served in the future by New Company, including, in each case, a desire to bring this pipeline to California.

The Court: Now, Counsel, you are standing up there making your offer of proof. You are out of order this morning. I am going to give you an opportunity in due course to put on any witnesses you want to, but this is a matter of order of proof. There is a time and a place for everything, and this is not the time. I don't intend to take that testimony at this juncture. I want to hear this case in great detail on the matters that have already been discussed here and have opened up, evidence taken; no arguments made yet, no argument at all on the evidence we have been discussing. And I think you are way off in left

field at this juncture. And all this really means is that at this point you may not put that evidence on, and there is no use standing up there trying to make an offer of proof, because I haven't excluded it. I have just told you this [fol. 454-394] isn't the time to do it. Rule 43 isn't applicable.

Mr. Noble: Excuse me, your Honor, may we have a moment to confer?

The Court: Just one of you at a time. One of you is going to be trying the lawsuit at a time. I am going to have you all talk.

Mr. Lipson: May I have the Court's indulgence?

The Court: Yes.

(Counsel confer.)

Mr. Lipson: Your Honor, I understand your Honor has ruled on the motion we just discussed—on the matter we have just been discussing. The Government has nothing more to add at this time until Mr. Riggs is available to resume the stand and continue his testimony. We are at the Court's disposal.

The Court: All right, what can we do, then? You haven't any other witnesses?

Mr. Lipson: Not at this moment, your Honor.

The Court: That is why you are bringing these witnesses in; you didn't have anything else.

Mr. Lipson: Your Honor, we are conscious of your admonition that the last thing you wanted to consider here was the alternate solutions.

The Court: That's right.

[fol. 454-395] Mr. Lipson: We have put them at the tail end of our presentation, yes, sir.

The Court: Well, we are not through yet. Mr. Harrison, have you anything we can proceed with?

Mr. Harrison: Well, yes, your Honor. I would prefer to see counsel conclude his case so far as he has a case, but if the Court wishes, we have some testimony.

The Court: Well, let's proceed.

Mr. Lipson: Your Honor, the only thing I believe is left pending as a result of the previous day's session was that Mr. Boyd stated he would check certain figures relating to Northwest Production Corporation and report on the results of his check. If you prefer, Mr. Boyd can return to the stand, or we can do it by stipulation of counsel.

The Court: Well, you proceed in any way you want to.

Well, we will come back at two o'clock. Apparently we need another recess. Counsel isn't ready to go forward.

(Whereupon a recess was taken until 2:00 p.m. of the same day.)

[fol. 454-396] December 8, 1964, 2:00 p.m.

The Court: All right. Proceed.

Mr. Harrison: We're ready to proceed, your Honor, with testimony.

Mr. Boyd, will you take the stand? I think Mr. Lipson wishes to ask some questions before we proceed.

Howard Boyd, recalled as a witness on behalf of the defendant, having been heretofore duly sworn, testified further as follows:

Further cross examination.

By Mr. Lipson:

Q. Mr. Boyd, at the previous session you were shown a copy of Government Exhibit No. 9, and you were asked to determine whether the figures that appear on Government Exhibit No. 9 as net income for Northwest Production Corporation for the years 1958, 1959, '60, '61, '62, and '63 are accurate.

A. Yes,

Q. Have you made that?

A. We've checked it out, and we find those figures to be accurate.

Mr. Lipson: For the record, your Honor, I'd like to state that the figures are as follows: 1958, $264,592 profit. 1959, $358,587 profit. 1960, $30,018 loss. 1961, $523,089 loss. 1962, $1,646,427 loss. 1963, $720,865 loss.

[fol. 454-397] By Mr. Lipson:

Q. One additional question with respect to the—

The Court: Now, what are these?

Mr. Lipson: These are the net income or loss figures for Northwest Production Corporation, a corporation which according to the balance sheet in Defendant's Exhibit A, the divestiture plan, will be merged into New Company. It is a company that had been a subsidiary of Pacific Northwest and whose stock is presently owned, as I understand it, by El Paso.

The Witness: That's correct. Not all of it. There are some outstanding shares.

By Mr. Lipson:

Q. Something like 96 per cent is El Paso?

A. It's a very high percentage.

Q. One further question with respect to Northwest Production Corporation, Mr. Boyd. Is it your understanding that the total assets of Northwest Production Corporation are $15,120,159?

A. Yes. That's what's shown there, and I have checked that and found that figure to be correct.

Mr. Lipson: I have no further questions.

Redirect examination.

By Mr. Harrison:

Q. Mr. Boyd, on page 275 of the record commencing at page 22 there appears the following statement by Mr. Lipson: "On October 19 past, El Paso submitted to this

[fol. 454-398] Court its proposed plan of divestiture. The Government had been apprised of that plan a few days before."

And again on page 276 the following statement: "We have checked it out in as much detail as was possible in the intervening time, since a plan of comparable detail had not been submitted to us previously."

I would like to ask you, Mr. Boyd, when is the first time that you informed, if you did inform, any representative of the Department of Justice concerning the company's plan of divestiture?

A. The Supreme Court's decree—Supreme Court's decision came down on April 6. Within a matter of a couple of weeks thereafter, we took the initiative and approached the Department of Justice to make an appointment to discuss how the Supreme Court's decision could be implemented. An appointment was made for us to meet with representatives of the Department of Justice on April 29, 1964. At that time we left with the Department of Justice this memorandum, "El Paso Natural Gas Company's program for divestment." And we discussed the terms of it at that time.

The principles of that memorandum have not been in any respect abandoned since April 29.

OFFER IN EVIDENCE

Mr. Harrison: We'll ask that the document referred to by the witness be admitted in evidence.

The Clerk: L.

[fol. 454-399] (Defendant's Exhibit L was thereupon marked for identification.)

The Court: Now, what do you claim for this?

Mr. Harrison: This, if your Honor please, shows that this matter of a proposal for divestiture which the company has prepared has been before the representatives of the Department of Justice for six months.

The Court: All right.

Mr. Harrison: And that in the discussions which have occurred in all of that time, they were fully advised not only of all the terms, but of our activities in connection with the presentation of such a plan to the security holders, and that it is not a surprise. It just was presented to the Government on October 19, or any subsequent date, and that at no time prior to this hearing did a representative of the Department of Justice present such a plan, if it is a plan—it was mentioned this morning for the first time—the creation of a company to acquire assets of El Paso, as Mr. Lipson states it, to go to California.

The Court: Well, we'll receive it.

(The document marked Defendant's Exhibit L was received in evidence.)

The Court: Counsel for the Government handed me up a document last week. What was that document you handed up that had some plan in it?

[fol. 454-400] Mr. Lipson: That was a proposed decree that the Government had drafted, your Honor.

The Court: Now, has that been disseminated, so folks know what it contains?

Mr. Lipson: I don't believe it's been given wide distribution, your Honor. It's been given to counsel for El Paso, though.

The Court: You have it?

Mr. Harrison: I received it during the course of this—

The Court: Hand it up.

The Clerk: Your law clerk has it, your Honor.

The Court: Never mind, then.

We're in a little trouble with our file here, because it contains all these petitions and applications for intervention and the like; and we're working on it. So it isn't in here. If you're going to want any part of that file, maybe you'd better let us know in advance, so we can get it in here.

All right. Go ahead.

This isn't what was handed up to me. This was something else. You had some kind of a memorandum, and at the end of it there was a very brief outline of your proposal to sell it to somebody outside of the corporation.

Mr. Harrison: Well, in counsel's opening statement—

Mr. Lipson: I believe you're referring to the Govern-
[fol. 454-401] ment's brief, your Honor. We do have copies of that also.

The Court: Well, I have one in the file. Let me have that. It's been filed, has it? It's in our files?

Mr. Lipson: Yes.

The Court: Now, have these other interested parties in the courtroom been given an opportunity to see that?

Mr. Lipson: Yes, your Honor. It was just today the copies were delivered to us, and we have announced generally that they are available for distribution.

The Court: Now, while I'm on this subject, if I may just a moment—you won't need to sit down, I'll only be a minute, Mr. Harrison—in the preparation of the memorandum which—really, memoranda, because perhaps we're going to answer each one of the 21 applications in that—that is, give the Court's views of the applications and petitions and address ourselves to each one of them in some particular.

Of course, in general, an application of Section 24 to the whole situation. And, of course, I have already indicated in this a general way what the memorandum is going to contain. I don't believe under the provisions of 24 anybody is entitled as a matter of right or permissively to intervene.

However, in the preparation of that memorandum I'm considering something else to which I didn't address myself this morning and didn't know whether I would; and I think [fol. 454-402] I should, because some of the lawyers have been making some inquiry about it, and that is whether or not I am going to give anyone leave to appear as amicus curiae in this matter. And I haven't made up my mind about it, but in the preparation of the memorandum I am

going to have a close look at that. But whether we give you leave to appear as amicus curiae or not, I hope there will be nobody who will feel unwelcome here. I do welcome your presence, and I should hope that if you had something you thought would be a contribution and of some assistance to the Court that you would have no hesitation in approaching us about that, either here in the court room or orally or by written memorandum.

I said somewhere along the line last week that there is quite an aggregation of talent here; and if there is any help that you can give the Court, the Court will welcome that.

I don't know whether anyone will be given leave to appear as amicus, or, if someone, which ones. We are making an examination of the subject. And, again, in the way I hope to proceed, and further, in elaboration of my ruling just before lunch, in refusing to hear some testimony at that time as a matter of order of proof, I think we have some serious investigation yet along the lines of the divestiture plan of the El Paso Natural Gas Company. I want to bore in on that subject, and we are going to have many [fol. 454-403] hearings about it, I should imagine, as soon as we get all of the evidence closed on that subject, and without depriving you of an opportunity later, if that should become necessary, for you in making your record. We'll hear further testimony from you, I say, if it becomes necessary.

[fol. 454-404] We are not going to argue this case all in one bite, as I said the other day. There are many segments involved in this plan, and I want to take them up. I want to take up every objection the Government has to the plan, and I will hear both of you fully, and I should hope I might participate myself some, and we will have the record before us, and we should have enough copies of the record so that both counsel and the Court can look at them. Miss Hallam sees that the Court gets a copy.

Now, with the record, so that we know precisely what we have by way of evidence, and with your research and

your briefs on the law, as we go, we are going to make some inquiry into the legal aspect ourselves. We are going to examine every detail of this plan, and we are going to see whether we can work it out without what counsel is proposing here in the Government's plan of divestiture.

This Court has broad powers in a matter of this kind, and I should be surprised if, in the use of those powers, we A couldn't solve this problem and solve it to the complete satisfaction of the Department of Justice. We invite your help on that.

All right, now, as soon as my staff can get, with some assistance from me, this memorandum ready, we are going to give it to you.

The memorandum I am going to hand you is concerned [fol. 454-405] with the ruling I made this morning denying the applications for intervention. We may have something to say with respect to the petition or two to be admitted as amicus.

The only one I have granted so far is the Federal Power Commission.

All right.

By Mr. Harrison:

Q. Showing you Defendants' Exhibit L, I will ask you whether, at the meeting you last mentioned the details of that proposal were discussed with representatives of the Department.

A. Yes, they were discussed at that meeting and at subsequent meetings at length.

Q. And will you state generally at what subsequent meetings the plan of divestiture was discussed?

The Witness: Your Honor, if I could step down and look in my briefcase, I have a compilation of the date—

The Court: Go ahead.

A. With the Justice Department the plan of divestiture as submitted by us on April 29th was discussed at the

following subsequent times: May 20, June 22, August 13, September 9, October 1, October 14, October 26, November 5, November 10, and November 18.

By Mr. Harrison:

Q. Subsequent to the presentation to the representatives of the United States of Exhibit L, did you present any more detail in connection with the proposed plan?

[fol. 454-406] A. Yes. Some we volunteered. Much was requested of us during the course of these continuing negotiations. Just to give you a very brief outline of what that detailed, on May 20 we submitted a map showing graphically what the division of the properties would be, and that was accompanied by a description of the properties that we proposed to transfer to New Company.

On that same date we submitted a list of names and addresses of all persons having over 5,000 shares. That list is already in evidence here. We also, on that same date, May 20, submitted a list of all persons holding more than a hundred thousand shares, and that, too, is in evidence here, and we likewise gave them the breakdown in numbers of stockholders, but not names and addresses, of all stockholders holding less than a hundred shares, all stockholders owing exactly a hundred shares, and all stockholders owning between 101 and 200 shares.

On August 13 we supplied the exhibits showing the gas supply, which likewise has been introduced in evidence here, broken down between geographical areas and indicating what we call a gas balance. Those two exhibits show the deliverability life and life index which the New Company would enjoy.

Then we assembled all of that data in this brochure which is entitled, "New Company Under Plan of Divesti-[fol. 454-407] ture," submitted it to the Department of Justice on September 9, and then in a conference with His Honor, at which time representatives of the Department of Justice were present, we submitted to the Court that bro-

chure showing the plan of New Company under El Paso's proposal for divestiture.

OFFER IN EVIDENCE

Mr. Harrison: We will ask that the document last mentioned be admitted in evidence.

The Clerk: That will be M.

(Defendants' Exhibit M was thereupon marked for identification.)

Mr. Lipson: Mr. Harrison, I noticed there were some pencil scratches on that document. They are not included in it, are they?

Mr. Harrison: No, I will remove them.

The Witness: Simply the date that I have just testified to.

By Mr. Harrison:

Q. Did you have subsequent discussions, then, with respect to the plan as set forth in the document last mentioned?

A. Yes. We had discussions continuing right up to November 18.

Q. At any time during those discussions did any representative of the United States suggest to you that it would oppose the distribution of the shares of the New Company to the stockholders of El Paso?

A. There was indicated to us that some appropriate re- [fol. 454-408] strictions would have to be employed in order to deal with what was mentioned as a community of interest, and we made numerous drafts that were designed to deal with that question, and some of the suggestions as to methods by which it might be met came from representatives of the Department of Justice.

Q. Were any suggestions made to you in any of those conferences that the assets for the New Company set forth in the plan should be sold to a purchaser?

A. No, sir.

Mr. Harrison: I have no further questions, your Honor.

The Court: We will receive the exhibit. I don't believe that has been received.

(The exhibit marked Defendants' Exhibit M for identification was received in evidence.)

Recross examination.

By Mr. Williams:

Q. Mr. Boyd, is it not true that we received from El Paso after the last hearing before His Honor the last group of information the Government had requested in order to enable it to completely evaluate the plan that is proposed by El Paso?

The Court: Read that question.

(Question read.)

A. As a matter of fact, Mr. Williams, at the last ses- [fol. 454-409] sion of the court—and I gather that you are referring to the occasion of October 19—I think we had, in fact, furnished the Department of Justice with all of the information that they had asked of us prior to that time. We did indicate a willingness then, as we have consistently, that we would furnish whatever you asked of us if it was possible to do so, whether we considered it to be relevant or not.

After the meeting on October 19, you did ask for some additional information, and we furnished that, together with material that we had theretofore furnished. I don't even recall what the nature of the request was that you asked of us after October 19, but whatever it was, we furnished it.

Q. You did supply us with additional information?

A. That is correct.

Q. Mr. Boyd, during the course of conversations with representatives of the Department of Justice, did those rep-

resentatives not make it clear that the Department's position is essentially this: that whatever form of divestiture was undertaken the Government had a duty to do all it could to see that the company to be created was completely free and independent of any control by El Paso and (2) that the assets and properties to be transferred to the New Company would make it a viable competitor?

A. Exactly so. We recognized that that was the obligation imposed on us by the Supreme Court of the United [fol. 454-410] States, and the discussions took the form of how that might be implemented.

Q. Isn't it also true, Mr. Boyd, that from time to time during the conversations, representing the Department of Justice we indicated we had problems with certain aspects of the plan, namely, the allocation of gas reserves, the tax loss carried forward, disposition of the sale of stock in Westcoast Transmission, and the contracts?

A. These are matters that were discussed from time to time, and, Mr. Williams, you customarily spoke for the group, and you said that you were not entirely satisfied with them, you did not know what your ultimate position would be, and that there were some points in the discussions which you might not be able to agree to, and, as to those points, you would submit the matter to the Court for a decision.

Q. Isn't it also true, Mr. Boyd, that at the last meeting we indicated to you it looked like we had gone as far as we could go in negotiations, and we would refer the matter to the Assistant Attorney General to get his views?

A. That isn't the way I interpreted what occurred at the last meeting, Mr. Williams.

You may recall that it was at the last meeting that the Department itself submitted to us—this is November 18, I believe—a proposed decree which contemplated by its very terms that the stock of New Company would be distributed to the stockholders of El Paso Natural Gas Company, but it [fol. 454-411] also went on to provide, as we have in our

decree, that there be certain restrictions that would be applicable to the officers and directors of El Paso and also would apply to what were characterized as large stockholders.

We suggested that, rather than working from your decree, your draft, that we work from a draft that we produced; and we worked it down to the last comma. Certain inconsequential word changes were suggested. We finalized those the night of November 18, sent the final draft over to your office. I think you indicated you were going to be out of town for a couple of days. It was available on the morning of November 19. What time it came into your hands I am not sure, but it was within a matter of a couple of days after November 18. And you had said to us that you were going to have to clear this with the Assistant Attorney General in charge of the antitrust division.

We heard nothing more until about 2:30 Friday afternoon a week ago, at which time we got the report, without explanation, that our plan was not acceptable.

Q. Mr. Boyd, the conversation you referred to is between counsel—

A. That is right.

Q. (Continuing) —namely, between myself—

A. And Mr. Glass.

Q. (Continuing) —and your Washington counsel?

[fol. 454-412] A. That is correct.

Q. But, in any event, the parties, after extensive negotiations, came to the conclusion they could not agree?

A. We didn't come to the conclusion we couldn't agree. It may have been a unilateral determination. We thought we had agreed, as Mr. Lipson had indicated to the Court here on two occasions, there was every reason to believe that we could agree. He said that on the record, and he said it to His Honor in chambers when we were present.

Mr. Williams: That is all I have.

Mr. Harrison: No further questions.

(Witness excused.)

Mr. Harrison: Outside of the necessity, your Honor, of perhaps putting on brief engineering testimony when the engineering witness of the Government is finished, we rest.

Mr. Lipson: Your Honor, with respect to the Government's engineering witness, Mr. Riggs, he has been in touch with the postal authorities and he understands, although the material requested may be delivered this evening, the post office itself may be closed at that time and we may not per chance be able to secure it before tomorrow morning.

The Court: I think there is a window down there that is open 24 hours a day.

Mr. Lipson: I will have to check on that, your Honor.

[fol. 454-413] The Court: If I were you, I would look into that. That is my understanding. It is on the south side down here.

Mr. Lipson: I will check it.

Mr. Harrison: I await—

The Court: If you need an order, I will give you an order.

Mr. Harrison: Awaiting, of course, your Honor's desire with reference to how to proceed, we are prepared to proceed with argument now, your Honor.

The Court: Well, I think we ought to close the evidence except for the matter that Mr. Lipson discussed with me before lunch.

I regard that line of evidence as a diversion. I passed no reflection on anybody by using that term. By "diversion," I mean it is diverting us from the line of investigation the evidence has been pointed at up to this point. I want to pursue that evidence and the law.

Now, I hope both of you understand that I will want in writing, and as early as possible, your complete analysis of the authorities dealing with the type of situation we have here. I will want that—I wish I might have it at once, but let me have it at your earliest convenience, because

we are going to be using it. We are going to be looking at the law at the same time we look at the evidence, and I am going to depend upon you folks in the main to dig that law out for me.

[fol. 454-414] There are limitations upon my staff here. The powers that be allow me one law clerk, and that is in the interest of saving the taxpayers' money. But when we get into a situation like this, it isn't much in the interest of helping the Judge much.

So I am going to depend upon you folks. If need be, I may request a couple more. I want to move this along, and I am not going to decide it until I am satisfied by the authorities and the record that what we are doing is in the public interest, in furtherance of Section 7 of the Clayton Act, and in conformity with the spirit and purpose of the United States Supreme Court under which we are operating.

But we are going to proceed that way.

I think to go out of our way now and investigate three, as it was suggested possible purchasers who, Mr. Lipson says, have the resources and have some know-how in the gas pipeline business, it seems to me that that is diverting us on the inquiry that all this evidence has been directed to.

I am going to get after that first before we go into it.

That diversion, you know, could be two or three other lawsuits in themselves.

If we can't do something else and we have to sell this to some purchaser, as you fellows are suggesting, there is [fol. 454-415] going to have to be a rather solid inquiry into that and all of its aspects and effects before I would sign any such decree.

Now, I observe that the decree you have here doesn't suggest that we make that inquiry now. What it suggests in Paragraph 6 is that the Court hereby orders a hearing to be held on—whatever date—at which time it will receive proposals from all persons interested in purchasing the assets, together with their qualifications.

Now, I am certainly not going to do that now, and your own decree contemplates doing it later.

I think, if it is done at all, it will have to be done later.

Now, maybe what you ought to do is begin to get me something on the law. We are nearly through with the evidence. I don't know how much more you have with your engineering witness, Mr. Lipson. How much?

Mr. Lipson: I would expect we shouldn't be too long with him at all, your Honor.

The Court: Then you are through?

Mr. Lipson: Yes, your Honor.

The Court: And you have a little. How much is that going to be?

Mr. Harrison: If we have to put an engineering witness on, it will be, as far as the direct goes, five minutes.

[fol. 454-416] The Court: Well, then, we are almost ready to start our work in sifting out this problem, and maybe a recess would be in order to allow you to get up the law for me, unless you have it already.

Do you have it already?

Mr. Williams: Your Honor, we covered the law in relative terms in the memorandum we have already submitted to you.

The Court: I wonder if that is directed toward your proposition or El Paso's proposition?

Mr. Williams: It is directed to the problem in general, your Honor, in pointing out—

The Court: I want some law addressed to the problem in particular and, namely, El Paso's proposal or plan. That is what I want.

Mr. Williams: I think the memorandum is a little more specific and does direct itself to the proposal made by El Paso, your Honor.

Mr. Harrison: Well, if your Honor please, the law which I think Mr. Williams submitted in behalf of the United States related to the propriety of the divestiture stockholders. We have our authorities ready. We can file

a memorandum on that subject tomorrow. I can present it orally now. Either way the Court wants.

[fol. 454-417] The Court: Well, we want to discuss it orally, but I would like to have it in writing, too.

Mr. Harrison: Very well, your Honor. But the question I would like to ask with respect to your Honor's desire is this: Does your Honor wish us to submit a comprehensive brief upon all of the—

The Court: No.

Mr. Harrison: Just on the main—

The Court: We will do that as we go, one at a time. I am not going to take this all in one bite. We are going to take it up a point at a time.

And I will tell you what I believe. I believe we can find an acceptable plan which contemplates a spin-off to the shareholders of El Paso. It may not be all the shareholders of El Paso. This is something we will look into. We have all kinds of powers to protect the public interest and see to it that there is a free, vigorous, competitive situation, and I think we can put something together here, and I am going to be aiming at that.

That is being about as candid as a fellow can be. I don't want you to assume from that that I am pre-judging this matter at all, because I am not.

I am asking for the fullest kind of inquiry, fullest kind of research, fullest kind of examination of the facts, and the fullest kind of briefing of the authorities. I want to be [fol. 454-418] fully informed on it.

Now, we can do that any time you want.

Mr. Harrison: I take it, then, that our memorandum should address itself to this first problem, that is to say—

The Court: The problem that is sticking in the craw of the Government is the spin-off to El Paso's shareholders. They think there is a community of interest in the circumstance that, if that were done, the shareholders in New Company would be the same as the shareholders in El Paso, and they think that that does not meet the requirements of Section 7 of the Clayton Act. And that, I should

think, since they raise that point and say that is the most important point—I should think we should address ourselves to that one right at once.

Mr. Harrison: We will be prepared to file our memorandum tomorrow, your Honor.

[fol. 454-419] The Court: All right. Now, you folks, I don't know what you have in your brief here; but having in mind what the Court has said now several times, at least two or three times, are you sure that you have exhausted your research on this point?

Mr. Lipson: May it please the Court, I doubt if any lawyer will ever admit he has exhausted his research; but we'd like to draw your attention particularly to that section of the Government's brief starting with page 4 and continuing through page 5, through 6, through page 7, page 8, and page 9. That is essentially, your Honor, a legal analysis of the problem of a spinoff; and in there we have cited and relied on a number of the leading cases in the field.

I understand from your Honor's remarks that that will be the kind of a memorandum you'd expect of us.

The Court: Well, let's see. That's one, two, three, four, five, and three-quarters pages of legal material.

Well, we shall see what we shall see, I suppose.

We'll be in recess until tomorrow morning.

(Whereupon Court was adjourned until Wednesday morning, December 9, 1964 at 10:00 a.m.)

[fol. 454-420]

Transcript of Proceedings—December 9, 1964

The Court: All right, Gentlemen, you may proceed.

ARGUMENT BY MR. HARRISON ON BEHALF OF EL PASO

Mr. Harrison: May it please the Court, by way of introduction to this question of distribution of shares of the acquired company to stockholders, I think it might be well

to review with the Court the general background of this industry which appears in the record of the trial.

The Court will recall that from the very inception the Court took this view, the view later adopted by the Government and accepted by the Supreme Court that in this related industry of natural gas subject to the Natural Gas Act there was some rather unusual features so far as antitrust laws and their application were concerned.

In the first place, it developed in the main these companies enter into long-term contracts with their customers, and those long-term contracts are predicated upon demand, purchasers and supplies under the control of the supplier and require the construction of long-distance pipeline systems to transport the gas from the areas of production to distribution. Apart from that, they require, not only large capitalizations as such initial projects do, but they require the certification and approval of the Federal Power Commission.

As a result, it developed during the trial that prior to the acquisition of Pacific Northwest, Pacific Northwest was serving its northwest territory and adjoining states in [fol. 464-421] pursuance of a certification of facilities by the Federal Power Commission and, as a result, it alone was serving that area with natural gas. It alone was certificated to do so, and there was no indication of any probability of competition in that area by El Paso or any other pipeline company.

By the same token, in the interstate areas of the southwest, El Paso Natural Gas Company had entered into contracts, long-term contracts, for the service of its distributors and customers, all of which had been duly certificated and approved by the Federal Power Commission; and, as a result, its service in the southwest was removed from the area of competition under the antitrust laws. And, as this Court found—and the finding was not disturbed—there was no probability of competition by Pacific Northwest with El Paso in the southwest.

In California the situation was slightly different in that these contracts for the transportation and sale of natural

gas to distributors were made in segments of market demand under service contracts extending over long periods of time, usually 20 years, but perpetual, for that matter, because of requirements of the Natural Gas Act. And deliveries were made at the border to the two dominating distributors in California.

Each of the segments of demand of out-of-state gas, which, as I recall it, was approximately 50 per cent of [fol. 454-422] the gas then consumed in California, the other 50 per cent being from intrastate sources and not subject to Federal Power Commission control, were being made by El Paso Natural Gas Company with such long-term service contracts duly certificated by the Federal Power Commission.

This Court found—and that finding was accepted by the Solicitor General and the Supreme Court—that as to those segments of demand the sales were removed from the area of competition so far as antitrust laws were concerned.

The result was that with the exception noted by the Supreme Court as to all of these sales, neither Pacific Northwest was in competition with El Paso, nor was El Paso in competition with Pacific Northwest.

All of this, I think the Court will find, is pertinent to this question of how and whether stock of the acquired company shall be distributed to the shareholders of El Paso.

Upon appeal, it was contended, however, that despite the fact that the single effort of Pacific Northwest to make a sale of gas in Southern California to the Edison Company failed for lack of any buyer for the gas, as well as, we think, for other reasons, it was held by the Supreme Court that that indicated an interest in this Pacific Northwest Company in the sale of gas to satisfy future increments of demand in California.

[fol. 454-423] In short, the Supreme Court held, or confirmed, the finding of this Court that there was no present competition between these companies, either at the time of the acquisition or at the time of the trial. The Attorney

General himself in presenting this case to the Supreme Court rested his appeal upon the proposition that competition in this case is rivalry to promote future projects, to transport large quantities of gas for long periods, twenty years or more, through facilities to be constructed in the future, two, three, or perhaps as far as five years or more away.

He said that he was there dealing with the long term future. He said: "We are concerned with the structure of the market in the 1970's, the 1980's, and beyond."

And the Supreme Court itself adopted that interpretation of the Solicitor General and found: "The competition then is for the new increments of demand that may be merged with an expanding population and with an expanding industrial or household use of gas."

It went on to say that failure was not the test, nor was success the test of competition, and found that the Pacific Northwest Company was a company with sufficient resources, sufficient resourcefulness, sufficient ingenuity, and sufficient proximity to the State of California to enable the Supreme Court to hold that it would be a threat to future competition to serve future increments of demand in the [fol. 454-424] years ahead.

Now, this state of affairs applies to the immediate issue before us in several ways. In the first place, when this company is divested, when the New Company is created, there will be under these findings and upon this theory and upon the decision of the Supreme Court no existing competition between the New Company and El Paso as to the sales that are being made at the present time in their respective markets. The New Company will serve the Northwest, utterly free of any fear of competition, because undoubtedly it will be certificated under proper circumstances, and thus its market will be entirely removed from competition. And in like manner, El Paso's segments of demand in California which it serves and its service in the southwest will be entirely removed from the area of com-

petition, and El Paso will not be competing with the New Company for its northwest business, and the New Company will not be competing with El Paso for the southwest or California business now being served by El Paso.

Neither will compete with the other, except as to increments of market demand in the years ahead, to which either or both might aspire to the opportunity to fulfill. And while the Supreme Court's attention was directed toward California, those opportunities may be found anywhere, within economic reach of the gas resources owned or acquired by either the New Company or by El Paso. [fol. 454-425] So they may at some time in the future compete for a Project California, or a project to any other area of the country; but they will not be competing for that at the time that this Court divests the New Company, or the assets to the New Company.

Now, in the second place, it has bearing upon the issues before this court because it is not only a Section 7 case, and not a Section 1 Sherman Act case, but it is a case in which neither company in the past, either before this case was brought or at the time it was heard by this court, or when it was decided by the Supreme Court, engaged in active competition one against the other as to any then existing business.

In other words, it must be distinguished from the sort of situation, your Honor, where, let us say, a paper company, a paper manufacturing and distributing company, acquires another mill, let us say, in the Northwest.

Let us say it was the Crown Zellerbach Company acquiring St. Helens. And the court ordered Crown Zellerbach to divest St. Helens. St. Helens was selling paper products in competition with Crown Zellerbach at the time that it was acquired. You were then divesting a company which had at the time of its acquisition been engaged in direct competition, and that direct competition was terminated by the acquisition.

This is not such a case. It is to be distinguished even [fol. 454-426] from such a case, as we will later rely upon,

the duPont case, in which the whole background of the case was the sales of automotive supplies and equipment by duPont to General Motors over a long period of years, with a finding of the court that there had been a direct effect upon competition in that market as a result of the influence of the stockholder, duPont, upon its parent corporation—well, its affiliated corporation, General Motors.

We have nothing of that sort here. We have simply and solely the future prospect of competition, the future opportunity to compete, the opportunity to vie for future demands in the natural gas market of the west by either company or the other. And all that the Supreme Court held and all that the Solicitor General asked it to hold was that the competitive condition be restored to enable the divested company to vie for future, but not now existing demands for natural gas in interstate commerce.

I say that that has particular application here, simply because this is a Section 7 case. It is different from the ordinary case under the Sherman Act, because in the ordinary case under the Sherman Act the court is dealing with immediate direct restraints upon trade or commerce, combinations which are now and in the past have been a restraint upon commerce, conspiracies for monopoly; and all of those are present activities which are violations of the [fol. 454-427] criminal statutes of the United States, and all of those have already had substantial effect and adverse effect upon interstate commerce for trade, or the judgment would not have been rendered against the defendant.

And so when we deal with cases which are penal in character, when we deal with cases involving divestiture or divestment or other remedies under the Sherman Act, we are not dealing with Section 7 cases, for Section 7 cases inherently in their very nature are cases which do not look to proof of immediate or past damages or effect upon commerce or trade.

By the very nature of Section 7, the gist of the action, there has not yet been any injury to trade or commerce.

There is only the tendency to a reasonable future substantial effect upon commerce or a tendency to monopolize. And I might add here that the tendency to monopoly has never been a contention in this case.

So we may by way of introduction, may it please the Court, say that Section 7 cases are not governed by Section 1 cases. They are not governed by them as a matter of general principle; but if ever there was a Section 7 case where the penal provisions which apply under Section 1 should not apply, this is it, and this is, of all cases, the kind of case where, as the Supreme Court said in the General Motors case, these are not cases for penal or punitive action by the trial court on divestiture.

[fol. 454-428] The Government's brief has referred to three cases. I might by way of preface say that each of them is the sort of case that I just mentioned as coming under the Sherman Act, as constituting violations of Section 1 of the Sherman Act. In fact, if my memory is correct, they were all before Section 7 of the Clayton Act was adopted.

There had been several previous cases in divestiture of the kind we suggest here has been approved by the Supreme Court. They were not approved in United States v. Union Pacific Railroad. They were not approved for the simple reason that in that case, Union Pacific had acquired 46 per cent of Southern Pacific's stock, and this was held to constitute control and a violation of the Sherman Act.

The Supreme Court ordered divestiture. Before the mandate went down, the parties asked the Supreme Court to determine whether divestiture could be effected by distribution of Union Pacific stock and Southern Pacific to Union Pacific shareholders pro rata.

The Court held that such a procedure would not comply with its mandate, because the proposal would enable the Union Pacific stockholders to choose the directors of Southern Pacific, which is certainly not the situation in this case, if it please the Court.

The factual basis for the Court's concern was this. Union Pacific had 22,150 stockholders. Only 68 of them, [fol. 454-429] constituting one-third of one per cent of the total stockholders, owned 44 per cent of the outstanding stock in blocks of 5,000 or more shares. Their holdings constituted par value amounting to $140 million. And an additional 300 stockholders, constituting one and three-tenths per cent owned 19 per cent of the company in blocks of 1,000 to 5,000 shares, a total of nearly $60 million. So 68 of Union Pacific's more than 22,000 stockholders, one-third of one per cent of the total, would have controlled Southern Pacific upon a distribution to stockholders; and obviously, therefore, they would have controlled the other company. In fact, there would have been no divestiture at all. There would have been no change in the situation.

This is the sort of case, of course, that illustrates the very reason that the Sherman Act was adopted. The history of the operations of some of our famous, or notorious, as one chooses to call it, operators of the railroad system of the west have made a good deal of law and a good deal of fiction. We think that there is no possible relationship between that sort of case and this.

In that case there was competition, active competition. Competition was suppressed. The remedy of divestiture would have been no divestiture at all. It would, therefore, have been totally ineffective.

Now, the Reading case, which is another case cited by [fol. 454-430] counsel, there were two coal companies owned. I suppose they were captive coal companies, the Lehigh Valley Coal Company and the Reading Coal Company; and the real controversy was over the ownership of these two coal companies by the railroad company. And the purpose was to divest them so that competition between the two coal companies would be restored.

The real total, and complete answer to that case is, of course, that the parties, the Government and the parties agreed to a decree. All the stockholders agreed to exchange

stock on a basis that when the transactions were concluded, none of the stockholders of Reading Railroad Company, which would be the Lehigh Valley Coal Company, would own any stock of Reading Coal Company; and no stockholders in the Reading Coal Company would own any shares of the Reading Railroad Company.

The parties agreed to this. And the decision of the Supreme Court to which counsel—I believe it's the one he refers to—was a controversy between the preferred and common stockholders, as to whether the preferred stockholders were entitled to share in the rates in connection with this redistribution. The Government didn't appear in that case. The company didn't appear in that case. All that the Court was dealing with was a suit between private parties as to the disposition of a problem between them respecting a plan which had been entered by agreement of all of the parties and the trial court.

[fol. 454-431] I think it is pretty obvious that a consent agreement of this sort with respect to relief in a situation in which there is obviously a suppression of competition and a violation of Section 1 can have no application here. But if authority were needed, we find it in the duPont case, in which the Supreme Court said that when it comes to a matter of litigation, agreements and consent decrees are not considered of any value to the court.

However, we do have a case under—not under Section 1. That is the duPont case, which was decided in 1949. I might note that the Reading case was being litigated around 1910, and the date of the Union Pacific case was 1913.

The duPont case was in 1949. It was then that the Government charged that duPont's ownership of 23 per cent of General Motors common stock violated both the Sherman Act and Section 7. The suit was dismissed by the District Court. The Supreme Court reversed upon an opinion which dropped out the charge respecting violation of Section 1 of the Sherman Act and merely held that duPont had violated Section 7.

On remand there were different proposals submitted to the District Court. DuPont proposed that it be allowed to continue its ownership of the General Motors stock, but that its power to vote be divested by a passthrough of the voting power to the duPont stockholders other than [fol. 454-432] representatives of the duPont family interests.

The Government's plan proposed, in harmony with El Paso's here, that the General Motors stock owned by duPont be distributed to duPont shareholders, except for Christiana and Delaware, which were the companies representing the duPont family interests.

The District Court adopted the substance of the duPont plan, and the Government appealed from the decree rejecting its proposal for distribution to duPont stockholders, and the Supreme Court reversed.

I would like to note at this point the statement made by the Supreme Court in that case respecting the contrast between the treatment to be given the defendant in a Section 7 case and the treatment to be accorded in a case of finding a violation of Section 1 of the Sherman Act. It said:

"Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. The purpose of divestiture in a Section 7 case—"

—the Court said—

"—is the undoing of the acquisition."

And that will be our position here, may it please the Court, that proposals which are found in the Government's position are punitive, that they are not designed to undo the acquisition, that they are designed to create a new area [fol. 454-433] of competition which never existed in the past, and to do so by means of expropriating the property of El Paso Natural Gas Company.

The Court pointed out that stipulations and positions of the parties before it in a review of a divestiture decree do

not circumscribe the Court's power to determine that the decree complies with its mandate.

It then held that a partial divestiture of duPont shares in General Motors by passthrough of the voting power to the stockholders is not enough. It ordered complete divestiture.

It is perfectly clear, of course, that the Court did examine and approve the Government's proposal for distribution of the stock to duPont's non-controlling stockholders; that is to say, as to all of those stockholders who were not engaged or participants in the relationship between the duPont family and General Motors, the Supreme Court approved the Government's proposal that there be a divestiture by distribution of the shares to the stockholders of duPont.

Accordingly as we see it, the duPont decision is authority for the proposal made here to this Court by El Paso Natural Gas Company.

In short, the Supreme Court in the duPont case did not concern themselves with divestiture to the shareholders of duPont, who those shareholders were, how much stock [fol. 454-434] they got, either total or separately, and we are no more concerned here under these facts with that problem than the Supreme Court was concerned in the duPont case.

However, there has been considerable mention here of what is called community of interest. This has been mentioned on a number of occasions in the course of these proceedings to this Court.

The community of interest did exist in the duPont case. Community of interest does not exist in this case at all. [fol. 454-435] The community of interest which existed in the DuPont case was described in the Supreme Court's first decision. It traced the history of the DuPont family and General Motors from General Motors' infancy. It pointed out that from the very beginning of General Motors the Du Pont family and its members and its corporate organiza-

tions had exercised important influence in the management of General Motors, that it had at all times during that period been influential to the extent that it had influenced General Motors to purchase large quantities of automobile supplies and materials in restraint of trade and commerce by excluding from the market its competitors who were not thus advantaged in their relationship.

It pointed out that this community of interest between the management of General Motors and the DuPont family continued down to the very date of the decision by the Supreme Court in the DuPont case, and the Supreme Court was unwilling to accord to the DuPont family the benefit of the divestiture plan enjoyed by all other shareholders, because it said that, if the DuPont family retained any interest, even though it only be economic, in the shares of General Motors, that the pre-existing influence which the DuPont family had exerted over the management of General Motors could be expected to continue in one form or another to the detriment of competition and the sale of [fol. 454-436] products to General Motors. So it insisted, in respect to the DuPont interest, that it be treated differently and that its connection with General Motors be completely and entirely separate.

Now, it was not the ownership of stock by members of the DuPont family collectively or separately which constituted community of interest. The community of interest was between the representatives of the DuPont family and General Motors and the community of interest between the two companies which was a restraint upon competition and the sale of automotive materials that constituted the community of interest.

If members of the DuPont family had merely owned shares of stock with no history and with no relationship except the ownership of stock, the distribution would have been available to them as well as all of the other stockholders.

And so we are here. We are in the same category so far as all stockholders of El Paso are concerned, as those stock-

holders of DuPont who were not members of the DuPont family, and there is no community—was no community of interest at any time between Pacific Northwest and El Paso. There will be no community of interest upon divestiture. There will be no community of interest between El Paso and the New Company.

[fol. 454-437] Now, although consent decrees are not authority and are not recognized as such by the Supreme Court, it is nevertheless interesting to note that, particularly before the Federal Trade Commission, there have been numerous consent decrees of the character which is proposed here by El Paso; and while we do not present those consent decrees, or, for that matter, any decisions of the Federal Trade Commission as, in any manner, binding this Court or constituting controlled authority, nevertheless, as a matter of common practice, it would appear that, at least, they are not generally regarded as being contrary to antitrust principles.

I would like to point, however, to one case before the Federal Trade Commission, that of Proctor and Gamble, alleging violation of Section 7 in acquiring Clorox.

The divestiture was exactly the same as that sought here by El Paso. And the Federal Trade Commission had this to say:

"Recognizing that the purpose of a Section 7 proceeding is in no sense punitive, that the sale of an absorbed firm may be difficult to accomplish within a reasonable period of time and that, in the case of a large, publicly-owned corporation, the common ownership of its shareholders, both the acquired and the acquiring firms, is not necessarily incon-
[fol. 454-438] sistent with a meaningful separation of the firms, the Commission recently permitted a Section 7 respondent to spin off the acquired assets to a new corporation, the stock of which would then be distributed to shareholders of the respondent."

Citing the consolidated foods case.

"There is no apparent reason why this respondent should not be permitted thus to spin off the acquired assets to the new corporation or corporations as it so desires, and we have modified the order entered by the hearing examiner accordingly."

And so we submit to the Court that in the background of this case, in the background of a case which involves only regulated industries, when we are dealing with a divestment to a new company which will be subject to regulation by the Federal Power Commission, and when we are dealing, on the other hand, with El Paso, the divesting company, which will continue in existence but only subject to the control of the Federal Power Commission, with no past history of competition between them and their respective markets, with no immediate prospect of competition for the future, with only the duty of this Court to restore a situation in which both the New Company and El Paso may [fol. 454-439] vie to fulfill future market demands, not only markets available, we submit that the plan proposed by El Paso is eminently proper.

We were not dealing in consolidated foods or in Proctor and Gamble, or any of these other cases, with regulated companies. We are dealing here with regulated companies. We are dealing with companies that will be regulated not only by the Federal Power Commission, but in respect to their fiscal matters will be regulated by the Securities and Exchange Commission, which will—to which each company will in due course be reporting and subject to the rules of which both companies must submit.

Apart, indeed, however, from the regulated feature that I have just mentioned, the regulation feature that I have just mentioned we must look to the background, to the nature of the industry, and to the fact that under all of the decided cases the stockholders of El Paso are entitled to this much consideration from the Government, and, we suggest, by the Court, that unnecessary injury should not be visited upon them, because this is not a punitive proceeding.

Now, may I just briefly review El Paso's plan.

So far as the plan itself is concerned, it asks the Court to permit the company to divest to the shareholders, either by way of rights through procedure or dividend or in what manner it may choose to proceed in view of what may be [fol. 454-440] its business requirements and necessities and tax problems that confront it. But it has submitted to this Court a form of decree so that the Court would have before it those things which the company has agreed to do in the course of its discussions over the past six months with representatives of the United States.

These limitations upon the general language of the plan, the company hoped, would win the approval and consent of the Government. And, unfortunately, it has failed, because, before this Court, the Government now takes the position that no plan of divestiture in a Section 7 case is permissible. And it cites its own Sherman Act cases in support of that contention.

However, in response to the criticism of representatives of the United States, the company has offered limitations upon its plan. Those limitations are such that all of the New Company's shares distributable to El Paso's officers and directors and all of the New Company shares distributable to stockholders owning one-half of one per cent or more of El Paso stock be distributed to a trustee and voted by the trustee as the directors of the New Company may specify.

I would like to be a little slow in my reading of these, your Honor, because they are a little hard to absorb.

The Court: Take your time.

[fol. 454-441] Mr. Harrison: I would like to repeat that, if I may.

El Paso's plan requires that all New Company shares distributable to El Paso's officers and directors and all such shares distributable to its stockholders owning at least one-half of one per cent be distributed to a trustee and voted by the trustee as the directors of the New Company

may specify. Thus these individuals are stripped of all voting power.

This applies also to stock held by El Paso's Employee Benefit Trust, which are substantial in amount, being in excess of one per cent, if that is substantial. The Government seems to think it is.

Now, all of the New Company stock trusteed for El Paso's officers and directors must be sold within ten years, so the treatment which is accorded there is just about the treatment that was accorded the DuPont family. I fail to see that they fall in the same category.

Owners of one-half of one per cent or greater interest in El Paso and in the Employee Benefit Trust may never vote their New Company shares.

I might say that there are only six stockholders, individual stockholders, which own more than one-half of one per cent of the shares of the company. There is only one stockholder which owns more than one per cent, and that is [fol. 454-442] the combination of Employee Trust Funds.

El Paso itself is absolutely prohibited from acquiring any New Company stock, and for ten years from acquiring directly or indirectly any Natural Gas Transmission assets or stock without the permission of the plaintiff or approval of this Court or from having an officer or director or any person who is also an officer or director of the New Company; or even for five years from employing a person in the employ of the New Company without its written consent.

El Paso may not have an officer or director whose family owns more than one-tenth of one per cent of New Company stock. And "family" has a broad definition in the plan.

Pending distribution of the New Company stock, El Paso will receive, in exchange for the assets, stock which will be placed in the hands of a trustee to be approved by this Court and voted by the trustee as directed by this Court, which means, of course, that the first directorate for the

New Company will be an independent directorate, which will be an independent directorate approved by this Court. And I think it is fair to say, safe to say, that the Court is going to approve only the appointment of an independent directorate.

Now, after having recited all of these limitations which the company offers, which in my personal opinion is far [fol. 454-443] beyond what should ever have been asked or agreed to, we take a look at the stock ownership of El Paso.

El Paso's common stock consists of 23 million shares, approximately, held by 117,500 stockholders of record, of which 103,000 are owned by 88 per cent of the stockholders in lots of 200 shares or less.

Only six, as I have said, of El Paso's shareholders own as much as one-half of one per cent of the stock, and the Employee Funds 1.1 per cent.

Now, much has been said here, I believe, in the brief filed here by the Government and other comments referring to the fact that approximately 44 per cent of the company is owned by 1625 stockholders, which I think the Government said amounted to 2 per cent of the shareholders in number, in blocks of 1,000 or more shares.

Now, the figure is inaccurate because this group of 1625 stockholders, which appears upon an exhibit of the defendant, owning 1,000 or more shares of El Paso Natural Gas Company, includes 171 brokers and nominees and between them they hold 4,838,000 and upward shares of record in street names for their numerous customers.

Now, when you make the adjustment for that, you will find that you add about 1600 shareholders in that group of 1625 mentioned as holding a thousand shares or more, even though these additional ones may hold less, and you [fol. 454-444] will add 600 to the 1625, making in excess of 2200 shareholders in this group. And this group owns 10,399,000 shares of stock, as shown in Defendants' Exhibit 8, and that means that on the average each of them

owns 2/100 of one per cent of the total outstanding shares, .028 per cent.

Now, I do not conceive that we could get these 2100 shareholders in any town hall in the world. We couldn't get 1625 in any town hall in the world. We couldn't even find them. Obviously they are scattered from Patagonia to India to Alaska to the North Pole, and I would suggest it would be very difficult to find many of the 1625 who know any of the others or even how to talk to them.

Anyone who wants to engage in a proxy campaign may have his means of finding these people and pursuing them, but so far as there being any connection as friends, families, relationships, business or otherwise, between any of these shareholders, one with any of the others, there is not the slightest suggestion in this record. And the idea that somehow they are going to unite and exercise an influence upon either El Paso or New Company is just a fantasy.

Now, in addition to that, we would like to indicate to the Court what will happen if this distribution is made in the manner suggested by El Paso. The record shows that there is very active trading in El Paso stock. In the period of time of less than four years, since January, 1961, 16 [fol. 454-445] million shares, or a number of equivalent to 70 per cent of the total shares of the company, were traded in the three exchanges of New York, Chicago, and San Francisco.

[fol. 454-446] El Paso's transfer agent transfers average 603,000 shares per month, as shown by its records over the last six months, an annual average of 7,200,000 or more, constituting an equivalent of over 25 per cent of the total number of common shares outstanding.

And so we submit that this picture drawn by the Government, that if you permit a distribution of the New Company stock to the shareholders of El Paso, that on the very day that this is consummated that we will be a complete identify of stock ownership is substantially true. But it is not true tomorrow, and it will not be true within a very

short time after that distribution has been made. And within a very short time, a stock list of the two companies will be substantially different.

We submit that what this all shows is that if the Court permits distribution of these shares in the matter proposed, we will have in economic consequence no more than a sale to the public at large. And in that connection we would think the Court might look favorably upon a sale or distribution to the public at large as against preferential sale to some large corporate organization to take the place of El Paso. And so that combination is the one that would receive the benediction of the Court, while our present combination received the condemnation of the Supreme Court.

What is there objectionable about distribution widely [fol. 454-447] to the public? I would think that would be one of the policies that would merit the attention and approval of the Department.

Furthermore, I repeat that the day after the division of properties and the issuance of the shares, these companies will not be in competition. Not that day, your Honor. Not at the threshold of the business of the New Company.

True, the New Company may vie for business which El Paso would also like to vie for in the future; but certainly, by the time that occurs, the problem of stock ownership will not enter into the picture. And I say that for this reason. The Government has said to this Court that the present management of El Paso Natural Gas Company is strong, and it is powerful, because "The excessive dispersion of stock among the general public is such that your position is secure."

Once this Court has appointed an independent board of directors and approved an independent management of New Company, the dispersion of the New Company stock will be even greater than the dispersion of El Paso; and, thus, by the same token, that management will be as secure as El Paso's. And with a management of the New Company as secure as that of El Paso, does this Court conceive

that some influence is going to be exerted by 1,625 people who own stock in both companies to suppress their earnings?

If I'm an owner of a New Company and an owner in [fol. 454-448] El Paso, all I want from both El Paso and the New Company is to go to work and make me some money, and I want them both to do it; and if only one can do it, then I want that one to do it. And I don't care if either one of them does it. And I say to the Court, as far as the stockholders are concerned, the management that fails may be removed. The management that succeeds will certainly stay in office; and the New Company's management is going to want to stay in office, and therefore it's going to want to vie, and it will be able to vie with an instrument far more powerful than the efforts of Mr. Fish in 1954 to '56.

With respect to this ability to vie, Mr. Fish, the Supreme Court said, was able to vie with an organization, the extent and the resources of which are of record, and the Court's familiar with it.

I'm sure this New Company, with its resources, with its betterments, with its additions, with its additional reserves, will be in a far better position to vie than Mr. Fish ever was.

And what does "vie" mean? "Vie" means both with respect to El Paso and the New Company, it means this, it means, as Mr. Fish told you, you go out and you find a customer. You find a customer first. You find a customer that needs gas, and you find a customer that needs enough gas so that you can build a pipeline interstate, so you need [fol. 454-449] a customer that needs at least 300 million cubic feet of gas, and needs it now.

And then you'll need a producer, you know, like he had in San Juan Basin, like Phillips Petroleum, who wanted to shoot their gas up into the Northwest. You want a producer like Mr. Fish had up in Canada, who will give them 300 million, if he could get it. And then you build a pipe-

line, because, said Mr. Fish, "All you have to do is have the buyer and the supplier and the opportunity, and you can always borrow the money in New York."

And that's what the New Company can do, that's what El Paso can do, and that's what all of the other natural gas companies can do, and that's what you can do and I can do. And that's vying for the future business demand of California, and any other market that's available.

I wonder if I could have a recess for a few minntes, your Honor? My voice is having a little difficulty.

(Recess taken.)

The Court: All right. Go ahead.

Mr. Harrison: There are some general considerations arising out of the nature of the proceedings in this case which I think bear upon this question also, may it please the Court.

This suit was commenced in July of 1957. It was a suit to compel divestiture of the shares of the stock of Pacific [fol. 454-450] Northwest acquired by El Paso.

Had the matter proceeded to trial without complications that later ensued, and had the Supreme Court ordered divestiture, we would not of course have the problems we have today. These problems arise out of the fact that there was a merger.

But I would like to point out to the Court that this is not a case in which merger was consummated before the Attorney General, Department of Justice, could act or intervene. It was not a case in which a merger, even after they were in this case, occurred after they had instituted the case.

This Court will recall that there were motions and hearings before this Court over a period of some time.

The Court: About a year or more.

Mr. Harrison: Yes, sir, involving questions of primary jurisdiction and priority of procedure, whether it be by the Federal Power Commission or by this Court.

And after considerable delay—and I believe upon a motion in which the United States joined—this matter went before the Federal Power Commission on an application for leave to merge, and the Federal Power Commission after protracted hearings held that that merger was in the public interest. And that was affirmed by the Court of Appeals. It was set aside solely because the Supreme Court held that the antitrust suit should proceed first.

[fol. 454-451] So that the merger which was consummated by these two companies was not something that was done without the endorsement and approval of a public federal body having jurisdiction over those matters generally.

Let us say that we were justified by virtue of that order of the Federal Power Commission to believe that merger was proper and appropriate, and it was only then that it was consummated.

Now that these problems arise because of this merger, we say that the stockholders of El Paso should have consideration for their problems, in view of the fact that the merger was predicated upon an order of the Federal Power Commission, that the merger was carried out in good faith and in the belief that it was in conformity with law, and with the certification that it was in the public interest.

And after this case went to trial, the Court will recall the distributors of the Northwest appeared in this court and opposed the suit of the Department of Justice upon the ground that the merger was in the public interest of the northwest markets of the United States.

So we pursued the matter further, and we come before this Court with a plan of divestiture, brought about by necessities of the case and by the decision of the Supreme Court; and we offered the northwest, a viable company, strong out of all proportion to the company which Mr. Fish [fol. 454-452] led at the time of the acquisition, and I'll defy the Department of Justice to deny that the New Company will not be a far more effective distributor of natural gas in the northwest than Pacific Northwest could ever have been.

In view of these considerations, it strikes us as strange that this should be the first Section 7 case in which the United States attempts to establish the absolute principle, the divestiture by distribution to the stockholders of the acquiring company is not proper, and particularly so when that contention is made at the eleventh hour.

The Court: Well, suppose you start your argument this afternoon. Do you want to do that, or do you want to go ahead for fifteen minutes?

Mr. Lipson: Your Honor, I would prefer to start this afternoon. However, in view of the nature of the proceedings and the length that argument may conceivably take, I think I'd prefer, if your Honor allows, to continue the examination of Mr. Riggs, so that he may be dismissed.

The Court: Well, as soon as that can be done, we agreed in chambers to do that. If Mr. Riggs is—

Mr. Harrison: We're ready to let counsel know, your Honor. I doubt if we will be.

The Court: Well, they're examining your exhibits; and as soon as they're through with them, we'll go ahead with Mr. Riggs. We won't hold him here any longer than is [fol. 454-453] necessary. We'll try to get that done as soon as we can.

Mr. Lipson: Thank you, your Honor.

The Court: Now, I have a criminal matter coming on in ten minutes. So we'll recess until 2:00.

(Whereupon a recess was taken until 2:00 p.m. of the same day.)

[fol. 454-454] December 9, 1964, 2:00 p.m.

Mr. Lipson: May it please the Court—

The Court: Yes, Mr. Lipson.

Mr. Lipson: —I understand Mr. Harrison will inform counsel sometime this afternoon when we can expert to be able to resume examination of Mr. Riggs.

Mr. Harrison: Right.

ARGUMENT BY MR. LIPSON ON BEHALF OF GOVERNMENT

Mr. Lipson: I'd like to proceed now with the discussion of the spinoff and the matters raised by Mr. Harrison in his argument this morning.

Before we get into the specifics of the spinoff, I think it would be helpful to the Court if I corrected the record as to certain matters that were brought up this morning concerning the history of this case. The fact is, of course, that the Government did oppose the transfer of this case in the early stages to the Federal Power Commission. The authority for that is contained clearly, your Honor, in California v. F. P. C., 369 U.S. 482.

The Court: What do you mean, the authority?

Mr. Lipson: The statements of the Court in that case, California v. F. P. C.

The Court: I see.

Mr. Lipson: It commences with a short chronological summary of the events.

The Court: I don't remember, of course, but there would [fol. 454-455] be a record here.

Mr. Lipson: Yes, your Honor, there is a very compact summation of the things that happened at the various dates, and I'd like to apprise your Honor of just what did happen.

The Court: All right.

Mr. Lipson: This is on page 483 of the reports.

"El Paso Natural Gas Company first acquired the stock of the Pacific Northwest Pipeline Corporation, and then applied to the Federal Power Commission for authority to acquire the assets pursuant to Section 7 of the Natural Gas Act. This application was dated August 7, 1957. Prior thereto, on July 22, 1957, the Federal Government commenced an action against El Paso and Pacific Northwest, alleging that El Paso's acquisition of the stock of Pacific Northwest violated Section 7 of the Clayton Act.

"On September 30, 1957, El Paso and Pacific Northwest filed a motion to dismiss the antitrust suit or to stay it pending completion of the proceedings before the commis-

sion. On October 21, 1957, that motion was denied after hearing."

And we denied cert.

"In May and June, 1958, the Department of Justice wrote four letters to the commission asking that the proceeding [fol. 454-456] be stayed pending the outcome of the antitrust suit. On July 29, 1958, the Department of Justice was advised by the commission that it would not stay its proceedings. The commission invited the Antitrust Division of the Department to participate in the administrative proceedings, but it did not do so.

"The hearings before the commission started September 17, 1958. On October 2, 1958, El Paso and Pacific Northwest moved in the District Court for a continuance of the antitrust suit. On October 6, 1958, the Department of Justice asked the commission to postpone its hearing pending final outcome of the antitrust suit which had then been set for trial November 17, 1958."

[fol. 454-457] The Court: Give us again the reference in the United States Reports.

Mr. Lipson: Yes, sir, I would be glad to. It is Volume 369, 482 at Pages 483 and 484, your Honor.

The Court: Did you get that, Miss Hallam?

Mr. Lipson: We draw from that, your Honor, the fact that El Paso merged despite the efforts of the Department of Justice to prevent that merger and in the face of what was a then existing antitrust suit. The merger, your Honor will recall, occurred December 31, 1959. The suit in this case was filed July 22, 1957.

All stockholders, officers, directors, and creditors of El Paso had actual notice of this divestiture suit years before they merged. Necessarily they assumed the risk that there would be a divestiture, and they have no standing now that divestiture is required to plead that they are being penalized because they relied on the Government. Had they, in fact, relied on the Government, this lawsuit could have

been resolved years ago, your Honor, prior to the asset merger.

The Court: Well, I remember a little bit about that. Your predecessor here, and I have forgotten what his name was, in his first appearance in the fall, you read there, of 1957—I was ready for trial on that suit for a mandatory injunction to cause you to disgorge—El Paso to disgorge the 100 per cent common voting stock of Pacific Northwest [fol. 454-458] Gas Pipeline. I asked counsel when they would be ready for trial, and I told them I was ready. And counsel for the Government said, "I am ready, your Honor."

And so another postponement was called by something or other. Finally it turns out that the Government requested continuance after continuance in this court to the point where the Court told them they were dragging their feet.

In the meantime, the asset merger went forward and it got late in the springtime. And by that time the proceeding before the Federal Power Commission was far advanced. And when the Government announced they were then ready for trial, I decided to let the Federal Power Commission proceed and continue, although at that time there was some correspondence between the chairman of the Power Commission and me, and that chairman very generously and kindly, I thought, suggested that, if the Court wanted to proceed, they would cease their proceeding and send the—I think he said several carloads of exhibits out here. And I wrote him and said, "Why don't you go ahead with it."

I think you will find that in the record in this court, too.

Well, anyway, I don't think we are going to advance this cause very far by trying to place any blame for the situation that confronts us today. I suppose I can solve all that by saying that the Court is at fault because he ought to [fol. 454-459] have heard that injunction suit.

You know, hindsight is always 20-20 vision, and that is what the highest appellate court in the land has got, you

know, that is hindsight, 20-20 vision. That would have been a wonderful thing to have done, and we would have simply transferred stock back to the Pacific Northwest Gas Pipeline Company common stockholders, and they would have been in business again.

Well, anyway, the whole point of that little dissertation is that I don't think we are getting anywhere wondering who was to blame for what. What I want to hear about is this divestiture program. Go ahead, Mr. Lipson.

Mr. Lipson: Yes, sir. The point that counsel raised this morning, your Honor, which is very intimately tied to the divestiture program is the extent to which the Supreme Court recognized Pacific Northwest as a competitive entity, not in the Northwest, but in California, and a competitive entity to El Paso.

There was some reference to that area, your Honor, and I think in fairness the record should be clear, and I would like to quote a short paragraph from the Supreme Court opinion in the United States v. El Paso Natural Gas Company at 376 U.S. 651 on Page 658.

"Pacific Northwest, though it had no pipeline into California, is shown by this record to have been a substantial [fol. 454-460] factor in the California market at the time it was acquired by El Paso. At that time El Paso was the only actual supplier of out-of-state gas to the vast California market, a market that expands at an estimated annual rate of 200 million cubic feet per day.

"At that time Pacific Northwest was the only other important interstate pipeline west of the Rocky Mountains. Though young, it was prospering and appeared strong enough to warranty a treaty with El Paso that protected El Paso's California markets."

I am referring to a short statement which appears on Page 660 of the same opinion, your Honor:

"Pacific Northwest's position as a competitive factor in California was not disproved by the fact that it had never

sold gas there, nor is it conclusive that Pacific Northwest's attempt to sell to Edison failed."

That might be weighty if a market presently saturated showed signs of petering out, but it is irrelevant in a market like California where incremental needs are booming.

That is underscored in the case by a memorandum dated October 18, 1956, which summarized a meeting at which terms of the acquisition were negotiated. It recited that [fol. 454-461] Pacific Northwest had substantially concluded additional contracts for Canadian gas and that Pacific plans on selling this additional volume of gas to the California market.

"On November 5, 1956, just three days prior to approval by the directors of Pacific Northwest of the stock exchange, it made a firm offer to PG&E to supply up to 350 million cubic feet a day for 20 years. Even after that approval and before the actual exchange, the chief executive of Pacific Northwest, writing November 22, 1956, said—" and this is quoted, your Honor. "'I think for the present moment we should confuse the sale of gas from our system to California with El Paso taking part of the gas through their present system to California. The reason for this: Should the El Paso-Pacific deal collapse, we would have nothing of substance with California.'"

And I suggest, your Honor, that the emphasis of this case is not on the position that New Company will have or may have in the Northwest area, but the emphasis in the case, your Honor, should be with respect to California and its ability to compete with El Paso and others in the California market.

A vital matter connected with the spin-off proposal, your Honor, and with, generally, all forms of divestiture [fol. 454-462] that might be used in this case, is a matter of hardship on the individual stockholders of the defendant corporation.

This was referred to by counsel this morning, and he quoted the section of the duPont opinion that dealt with just precisely that issue, your Honor.

However, counsel did not continue to read the sentences following the quotation he gave, and I would like to bring it to the Court's attention.

The area quoted by counsel is on Page 326 of Volume 366 of the U.S. Reports.

"The key to the whole question of an antitrust remedy, is, of course, the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive."

However, the remarks continue, your Honor:

"But Courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.

"Divestiture is itself an equitable remedy designed to protect the public interest. In United States v. Crescent Amusement Company, where we sustained the divestiture provisions against an attack similar to that successfully made below, we said at Page 189, 'It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive. [fol. 454-463] Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience.'

"If the Court concludes that other measures will not be effective to redress a violation and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result.

"Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences.

"This provision is not novel. It is deeply rooted in antitrust law and has never been successfully challenged."

The opinion continues in the same vein further, your Honor, but I won't burden the Court by reading it now. [fol. 454-464] I should also like to observe at the outset that the cases relied on by the Government are all civil cases. They are not criminal cases, your Honor. However, they all involve divestiture.

Since the same form of relief is involved in each of the cases on which we rely, it is of no consequence that some of them may have been merger cases brought under the Sherman Act and at least one of the others a merger case brought under the Clayton Act, since both decreed the same type of relief.

It's certainly clear from remarks that the Supreme Court made in the duPont case, your Honor, that the Supreme Court itself makes no such distinction between Sherman Act divestitures and Clayton Act divestitures, since many of the cases cited and relied on in the duPont case were in fact Sherman Act cases.

As to the spinoff device, itself, your Honor, there are three cases that are of principal importance in this area: the Union Pacific case, the Continental case, which involves the Reading litigation, and the duPont case. All these cases are cited in both Government's brief and the brief submitted by defense counsel this morning.

Our research has not disclosed any other Supreme Court opinion bearing precisely on this point in the same way as these three cases. I'll treat them chronologically. The [fol. 454-465] earliest of the three is the Union Pacific case. By coincidence, your Honor, I understand that that case was also tried in the District of Utah. The decision on the merits—

The Court: That was about 1913, wasn't it?

Mr. Lipson: Yes, your Honor. That's exactly the year.

The Court: It's a little ahead of me.

Mr. Lipson: I'm sure it was. The decision on the merits of that litigation held that the Union Pacific's acquisition of 46 per cent of the stock of Southern Pacific was a violation of the Sherman Act. The District Court was then ordered by the Supreme Court to provide for the disposition of these Southern Pacific shares in such a way as would eventually dissolve the unlawful merger.

Prior to the day that the mandate of the Supreme Court came down, as Mr. Harrison has observed, the Government of the United States, who was joined in by the defendants in that case, applied to the Supreme Court and asked them to instruct the District Court on the propriety of a spinoff, as among the effective types of relief that might be used.

The specific question that was propounded to the Supreme Court, your Honor, would I think be of interest. The question was: "Whether or not a sale of the Southern Pacific Company shares held by said appellee to the shareholders of appellee Union Pacific Railroad Company [fol. 454-466] substantially in proportion to their respective holdings or a distribution thereof by dividend to the Union Pacific stockholders entitled to such dividend would in the opinion of this Court constitute a disposition of said shares in compliance with the opinion herein filed and the opinion on the merits."

The Supreme Court answered that question basically, your Honor: No, that that kind of relief would not be satisfactory.

According to the Supreme Court's method of reasoning that case, they assumed that the ultimate source of any corporation's power rests with its shareholders and that since the shareholders that controlled Union Pacific would under the proposed spinoff be identical with the shareholders of Southern Pacific, the Supreme Court characterized the spinoff as—and we quote the language of the Court:

"A proposition to perpetuate the domination and control of the Union Pacific Company over the Southern Pacific Company."

And that appears on page 475 of the reports, your Honor.

The appellees in that—Union Pacific in that case—argued that because there were so many shareholders, over 22,000 in number, your Honor, among whom these shares would be distributed, that the effect of the distribution would be to dissipate the control that Union Pacific might [fol. 454-467] have over Southern Pacific.

Nevertheless, the Supreme Court answered that argument. It took what we consider to be the following realistic view:

"It is by no means improbable, but quite likely, that if the stock was transferred to the stockholders of the Union Pacific Company by distribution among them, the large stockholders could by purchases and transfers of the stock get into their own hands the power of choosing directors of both companies and thus, though in a different manner, the Southern Pacific would continue to be in the practical control of the Union Pacific Company, which has been found to be a rival and competing company within the meaning of the law."

That appears on page 476 of the reports, your Honor.

The next case in the series involves the Reading litigation. The Reading case involved a number of things, but among which was a combination of railroads and coal companies. It was found that the combination violated the Sherman Act. The Supreme Court's mandate ordered that the District Court dissolve the combination. The District Court then entered a decree which on its face appears to be a spinoff, but on examination your Honor will observe that it is a completely different kind of spinoff than the [fol. 454-468] one El Paso proposes in this case; and I'd like to bring the details of it to your Honor's attention.

The provisions of the District Court decree in that case required five steps. First, the incorporation of a new coal company out of the combined assets of the merged railroad company and coal company.

The second step: The distribution of the shares in the newly created coal company to a trustee. The trustee would be appointed by the District Court.

The third step, your Honor, a transfer by this trustee of pieces of paper called certificates of impression in the new coal company to the Reading Company. The trustee would transfer to the Reading Company the certificates of interest in New Coal.

The fourth step required that the Reading Company distribute the certificates of interest to the shareholders of Reading.

Up to that point, your Honor, it is quite similar to the El Paso proposal. However, the fifth step is perhaps the most important from an antitrust viewpoint. It provided that the certificates were to be exchanged by the shareholders of Reading, the certificates of interest, for stock in New Coal Company only. And I would like to quote from the decree itself.

"Only when a company by an affidavit stating among [fol. 454-469] other things that the holder is not an owner of any stock of the Reading Company and is not acting for or on behalf of any stockholder of the Reading Company, or in concert, arrangement, or understanding with any other person, firm, or corporation for the control of the coal company and the interest of the Reading Company, but in his own behalf in good faith."

That quotation, your Honor, appears in the case of Continental Insurance Company v. United States, reported at 259 U. S. 56 at page 162.

The effect, of course, of that kind of spinoff, if we still want to call it a spinoff, your Honor, is that a completely separate set of individuals would be stockholders in the coal company and stockholders in the Reading Company. There could obviously be no community of interest. The combination would be thoroughly undone.

In the El Paso case, obviously the same shareholder would tend to hold the same proportionate interest in both

companies. We think this is the real distinction between a spinoff permitted by the Supreme Court in Reading and the one proposed by El Paso. And I might say in passing that I know of no other spinoff that has been sanctioned by the Supreme Court other than this Reading type of spinoff.

Interestingly enough, your Honor, the Reading decree came up for a very detailed review by Chief Justice Taft, in [fol. 454-470] the case of Continental v. United States, 259 U.S. 156. He analyzed this very section of the decree, and he viewed it just as I have explained it to your Honor as requiring that the holders of Reading have three possible choices. The holders of the Reading shares may either sell their certificates of interest in New Coal Company to persons who are not stockholders in Reading; or they may sell their stock in Reading before they themselves become a stockholder in the New Company. They have basically an election. And third, they might do neither. And by a certain cutoff date, if they do neither, then the Court shall sell their stock for their account. Chief Justice Taft, who spoke for a unanimous court—I believe that Justice Brandeis didn't participate—specifically approved of the District Court's plan as one that would successfully end the illegal relationship between the Reading and the existing coal company.

However, even with that kind of decree, the Supreme Court on its own initiative felt that it was necessary to impose a further tightening that would insure a separation of the stockholder interests in both companies.

And they rewrote a part of the decree, but adding this section:

"Not only shall the stockholders of the coal company upon receiving and registering their stock be required to make affidavit that they have no stock ownership in the [fol. 454-471] Reading Company and are not acting for or representing anyone who has, but also that the merged Reading Company shall be required to adopt a bylaw effective until the further order of the Court permitting

registration of transfer of shares of its capital stock in the names only of persons who shall make affidavit that they are not stockholders registered or actual in either the new or the old coal company and have not been and are not holders of proxies to vote shares of stock therein."

That quotation appears on page 175 of the reports, your Honor.

We think that the El Paso proposal falls short not only of the Union Pacific decision, but also of the type of spin-off that was sanctioned by the Court in the Continental case stemming out of the Reading litigation.

The most recent of the three cases, your Honor, is the duPont case, which is the decision in the duPont case relating only to matters connected with relief. That's reported at 366 U.S. 316. That is, your Honor, the most recent case to my knowledge connected with this entire area.

Generally, in the merits of the case, the Supreme Court had held that duPont's acquisition of 23 per cent of General Motors stock was a violation of Section 7 of the Clayton Act and went on to determine the effective form of relief. [fol. 454-472] Before doing so, the Court made an observation concerning the type of relief to which antitrust cases should be directed. This is reported on page 323.

"The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase more often than not is crucial, for the suit has been a futile exercise if the Government proves a violation, but fails to secure a remedy adequate to redress it. Of public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendant's illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause."

In that case the Supreme Court considered the possibility of passing through to the holders of duPont shares the voting rights that were connected with roughly 16 per cent of the General Motors stock. As you will recall, there was 23 per cent of General Motors stock involved in that case.

Approximately nine per cent were owned by members of Christiana and Delaware Realty, who were very closely connected with the duPont interests.

So we put them aside for the moment, your Honor, because they were treated separately.

The part of the decree that is of interest to us is the fact [fol. 454-473] that the remaining 16 per cent of the stock would have the voting rights passed through to the shareholders of duPont, the non-Christiana and non-Delaware Realty shareholders.

With respect to that part, the Supreme Court stated at page 331:

"The divestiture only of voting rights does not seem to us to be a remedy adequate to promise elimination of the tendency of duPont's acquisition offensive to Section 7. Under the decree, two-thirds of duPont's holdings of General Motors stock will be voted by duPont shareholders. Upwards of 40 million shares. Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate community of interest which we found to violate the law."

I'd like to pause at that point, your Honor, and observe that the community of interest that the Court was talking about was not a community of interest involving the family of duPont or the Christiana or Delaware Realty people. The community of interest that the Court was referring to here was the community of interest of the other duPont shareholders.

Continuing, your Honor.

"The duPont shareholders will ipso facto also be General Motors voters. It will be in their interest to vote in such a [fol. 454-474] way as to induce General Motors to favor duPont, the very result which we found illegal in the first appeal. It may be true as appellees insist, that these shareholders will not exercise as much influence on General Motors as did duPont when it held and voted the shares

as a block. And it is true that there is no showing in this record that the duPont shareholders will combine to vote together or that their information about General Motors' activities will be detailed enough to enable them to vote their shares as strategically as duPont itself has done. But these arguments misconceive the nature of this proceeding. The burden is not on the Government to show de novo that a pass-through of the General Motors vote, like duPont's ownership of General Motors stock, would violate Section 7. It may only appear that the decree entered leaves a substantial likelihood that the tendency toward monopoly of the acquisition condemned by Section 7 has not been satisfactorily eliminated. We are not required to assume, contrary to all human experience, that duPont's shareholders will not vote in their own self interest. Moreover, the General Motors management, which over the years has become accustomed to duPont's special relationship, would know that the relationship continues to a substantial decree and might well act accordingly.

[fol. 454-475] "The same is true of duPont's competitors. They might not try so vigorously to break duPont's hold upon General Motors business as if complete divestiture were ordered.

"And finally, the influence of the duPont Company itself would not be completely dissipated, for under the decree duPont would have the power to sell its General Motors shares. The District Court expressly held that 'there would be nothing in the decree to prevent such dispositions.' Such a sale would presumably restore the vote separated from the sold stock while duPont owned it. This power to transfer the vote could conceivably be used to induce General Motors to favor duPont's products."

I'll pause at that point, your Honor.

I think the decision speaks for itself, and the parallel between that and the El Paso situation here is clear. That decision dealt only with common ownership of what would have been approximately 16 per cent of the stock of General

Motors. In this case we have a situation that would involve common ownership of 100 per cent of the stock of El Paso and New Company.

Your Honor, that's the law on the subject, but I would like to make some observations as to how that law turns in with the facts in this case.

[fol. 454-476] Now, based on testimony given by Mr. Kayser at this proceedings at 74 and 75 of the transcript, and given by Mr. Boyd elsewhere in the transcript, it's a fair statement to say that the El Paso spin-off plan will result in giving each of the present stockholders of El Paso a stock interest in the New Company that would represent an identical proportion in the equity of New Company as the El Paso stockholder presently has in El Paso.

If I may refer your Honor to Government's Exhibit No. 1, the El Paso stockholder list that was prepared by El Paso's transfer agent, Chase Manhattan Bank, and just selecting some names at random, there is one person, Mr. Ames, who was listed as owning 43,500 shares of El Paso common stock. He is one of the largest El Paso shareholders; and under the El Paso plan as we understand it, he would have the right to obtain the beneficial and legal ownership of exactly the same proportion of New Company shares, with all the voting rights, dividend rights, property rights, that normally pertain to stock ownership.

Thus, Mr. Ames would be one of the principal stockholders in New Company, as well as being one of the principal stockholders in El Paso. And what's true of Mr. Ames, your Honor, is also true of Mrs. Ames, who owns 48,437 shares of El Paso stock. And it's also true of Cresslin Oil Company that owns 114,544 shares.

[fol. 454-477] The Court: What oil company?

Mr. Lipson: C-r-e-s-s-l-i-n. I'm not familiar with them, except as they appear in this tabulation.

Each of these persons and all other stockholders that are similarly situated will have an interest in New Company that is exactly identical to their share in El Paso:

and they would have all the rights that go with it, including the right to vote those shares, your Honor, the right to collect dividends, the right to keep, sell, or exchange these shares based on their own individual decisions, and the right to influence or to try to influence management of either or both corporations, according to the usual modes that stockholders exercise.

Now, the question may be asked, your Honor, as to how many El Paso stockholders would have these equal rights with respect to New Company shares; and we believe that the answer can easily be determined by referring to several defendants' exhibits, B, I, and H, as well as to Government's Exhibit 1.

First, it's to be borne in mind that El Paso proposes to impose certain restrictions, which we believe to be minor restrictions, on the New Company shares to which El Paso's own officers and directors would be otherwise entitled.

However, according to Defendant's Exhibit I, these minor restrictions would affect only 26 shareholders.

[fol. 454-478] The Court: How many are there in total?

Mr. Lipson: 117,500, your Honor.

I'd say, in fairness, that it may exceed 26 with respect to officers and directors, because members of their immediate family may also be included; but it's impossible to make that computation. In any event, it's a small number.

Now, El Paso also proposes to impose some of these minor restrictions on persons who beneficially hold one-half of one per cent or more of the El Paso common stock.

Now, based on the fact that Defendant's Exhibit H discloses that there are 22,938,369 shares of El Paso common stock presently outstanding, one-half of one per cent would equal 114,692 shares. There would be no restrictions on persons who owned less than that number of El Paso shares, unless, your Honor, they were among the 26 officers and directors previously mentioned.

However, the Defendant's Exhibit C discloses that there are only four other persons, plus their immediate families,

who are not already restricted because they are El Paso officers and directors and would be precluded from participating for that reason.

Adding together the numbers of the El Paso shareholders who would be restricted from full participation in the legal and equitable rights of ownership in a proportionate number of New Company shares, we have 26 as officers and [fol. 454-479] directors, plus four others as large stockholders, for a total number of thirty persons, plus their immediate families.

As your Honor may note, that's thirty out of 117,500 shareholders.

Each of the other 117,470 El Paso shareholders—that is, over 99 per cent of the total number of El Paso shareholders—will have an identically proportionate interest in the shares of New Company as they now have in the shares of El Paso. Each of these 117,470 persons, excepting again, your Honor, those few persons who may be members of the immediate family of the proscribed thirty, will obtain and will have an unrestricted right to own, vote, sell, keep, exchange, a proportionate number of shares of New Company stock, and they will have all other legal and equitable rights that are normally incident to such stock ownership.

Based on the information that is contained in Defendant's Exhibit C, and contained in Defendant's Exhibit I, we can also make this conclusion, that with respect to the number of shares of stock subject to these minor restrictions of the trust, only 1,362,642 shares out of a total number of 22,938,369 outstanding shares, that is only five per cent of the total outstanding shares, would entail any restrictions whatsoever.

Therefore, only an equivalent five per cent of New Company shares will be subject to any kind of restrictions. [fol. 454-480] The remaining 95 per cent of the New Company shares would be legally and equitably owned and voted by El Paso shareholders.

We think that there is no question but that the preservation of such a very high degree of common ownership be-

tween the two companies is not compatible with an effective decree of divestiture.

We think that this is established by the rules of the Union Pacific case that we have cited previously and by the rules cited in the duPont case discussed just previously.

The result is that over 99 per cent of the shareholders, representing over 95 per cent of the common stock of each company, would be common; that is, common to each company.

We think that just as the Court found that a spin-off proposed in the Union Pacific litigation was merely a proposition to perpetuate the domination and control of Union Pacific over Southern Pacific, here, too, El Paso's proposed spin-off will have no greater effect, and obviously would have a lesser effect, your Honor, because 100 percent of the stock is involved, not merely 46 per cent.

I would like to address myself to one other matter connected intimately with the spin-off arrangement proposed by El Paso, and that is the matter counsel spoke of this morning concerning the wide distribution of El Paso [fol. 454-481] shares. I suppose the question is whether El Paso's supposedly wide distribution of shares can in any way detract from what we believe to be the anti-competitive effects that would stem from this common ownership we've just spoken of.

In this regard we propose to consider Defendant's Exhibit H in some detail. That compilation was prepared by El Paso through its agent and contains an analysis of El Paso's stock ownership as of a recent date, November 16, 1964. It shows that El Paso does indeed have a very large number of shareholders. However, even a cursory analysis of that document will reveal that a fairly small percentage of all the shareholders own a very large proportion of the corporation's stock. There are, as Defendant's Exhibit H shows, 117,500 shareholders, but 85,695 of them own 100 shares or less each; and as a group they only own a total of 4,579,901 out of 22,938,396.

Converted into percentage terms, your Honor, and these are rough percentages, because I calculated them myself, it means that over 73 per cent of the number of persons who are stockholders of El Paso account for only about 18 per cent of the total outstanding stock.

The converse, as a mathematical truism, would also be true; that is, only about 27 per cent of El Paso's shareholders, representing 31,905 persons, own 82 per cent of the outstanding stock.

[fol. 454-482] In his testimony Mr. Kayser testified at page 50 of the transcript that generally speaking, your wide distribution would be found in two hundred and less. Therefore, we will use two hundred and less as a reference point, your Honor.

We can determine from Defendant's Exhibit H that 103,449 persons, representing 88 per cent of persons who are El Paso shareholders, own about only 32 per cent of the El Paso shares; that is, your Honor, the persons who own 200 shares and less, a total of 103,000 out of 117,000 shareholders.

Here again, the converse is also true, and perhaps it is even more illuminating, because it shows that only 14,051 persons, representing 12 per cent of all shareholders, own about 68 per cent of the outstanding shares.

Thus, we think that there is in fact, your Honor, an economic fact, not really a wide distribution of the overwhelming majority of the El Paso shares.

[fol. 454-483] We think that it shows that a control of New Company under the El Paso proposal will not, therefore, be dissipated among a large number of shareholders. Instead, it will be concentrated in the same relatively few hands as now control El Paso.

The same analysis, your Honor, can be repeated at each step up the scale that is shown in Defendants' Exhibit H. At each increment of ownership of 100 shares, of 200 shares to 1,000 shares, we find that a relatively small number of shareholders continue to own vast amounts of El Paso common stock and would, under the El Paso divestiture

plan, be able to control to the same degree a proportionate share in New Company stock.

I would just like to use one further example based on Defendants' Exhibit H. That document shows that 1,625 persons own 1,001 shares and over. These people constitute only 1.3 per cent, 1.3 per cent, your Honor, of the total number of all El Paso shareholders, but they control about 45 per cent of the outstanding El Paso shares.

In terms of numbers of shares, the 1625 persons control 10,399,775 shares out of the total 22,938,369 outstanding.

It might be said from this analysis, your Honor, that the hands that are in a position to manipulate El Paso will still be in a position to manipulate the strings of New Com- [fol. 454-484] pany if El Paso's proposal goes through.

We think we have demonstrated that the El Paso shares are, in effect, not widely distributed, and that the distribution of New Company shares would necessarily be equally concentrated.

However, even if there were a wide distribution of shareholder interests, we don't concede at all that that would be a basis for approving the type of spin-off offered by El Paso.

In the Union Pacific case the Supreme Court made specific reference to the fact that distribution of 46 per cent of Southern Pacific stock among over 22,000 Union Pacific shareholders would not, in fact, be sufficient to conclude that combination.

In the duPont case a distribution of 23 per cent of the General Motors shares to over 230,000—that is more than El Paso shareholders, your Honor—230,000 individual owners of duPont stock was also found to be an ineffective and inappropriate device to accomplish a divestiture in a case involving a Section 7 violation.

It should also be recalled, your Honor, that in the du-Pont-General Motors case General Motors already had over 700,000 stockholders of record who owned 77 per cent of the General Motors shares that were then outstanding, so that the spin-off that the Supreme Court opposed would

[fol. 454-485] have occurred in a setting with a distribution of ownership which was far wider already than that shown to exist here.

The figures I am using with respect to the duPont distribution, your Honor, are not all found in the Supreme Court opinion. Some are found in the district court opinion, which is at 177 Federal Supp. 1, at Page 13.

Therefore, even if a distribution of El Paso shares were as wide as claimed by El Paso, we think there is still no legal basis for sanctioning the spin-off of New Company shares as proposed by El Paso.

I would like to refer to one other thing in this regard, your Honor, and that is whether or not so many El Paso shares are traded on the market that there would be a dissipation of ownership over a relatively few years.

You will recall that Defendants' Exhibit E was referred to in this regard. Mr. Kayser was questioned with respect to Defendants' Exhibit E when it was presented.

The testimony with respect to it occurs on Page 49 of the transcript in a voir dire examination:

"Question: Who prepared this document, Mr. Kayser?

"Answer: It was prepared under my direction. I did not do the actual preparation.

"Question: I notice at the very top—do you have a copy of the document in your hand, sir?

[fol. 454-486] "Answer: Yes. I have the one I was just reading from.

"Question: The total number of shares traded is given as 16 million dollars—"

Which I subsequently corrected to 16,499,302 shares.

"That is over the entire period?

"Answer: That is correct.

"Question: 1961, 1962, 1963 and the first ten months of 1964?

"Answer: That is correct. In those three stock exchanges.

"Question: Right. In what way can you determine whether the same shares were traded more than one time during this period?

"Answer: No way. It doesn't pretend to do that. It simply shows the magnitude of the trading in El Paso stock.

"Question: The same shares could have been traded a multiple number of times to arrive at this figure?

"Answer: No question."

Mr. Lipson: I think, your Honor, that is conclusive of the fact that we cannot rely on the fact that a lot of trading in numbers of shares on an exchange would necessarily mean that the ownership would be substantially affected in any way.

[fol. 454-487-488] The Court: What is the figure on the trading again?

Mr. Lipson: Sixteen million, your Honor—in excess of 16 million over a four-year-ten-month period, 16,499,302 shares over the period 1961 through the first ten months of 1964.

I would like to refer now, your Honor, to a matter that is closely connected with this stock distribution, and that is the trust that will hold some proportion of the shares so that those persons intimately connected with El Paso in theory would not—or might be restrained from holding a proportionate degree of interest in the company.

As brought out by Mr. Kayser's testimony as appears on Page 78 of the transcript, the El Paso divestiture plan does contemplate such a trust. Mr. Kayser also brought out that persons owning one-half of one per cent or more of the El Paso common stock would have the New Company stock to which they would otherwise be entitled trusteed in this same trust.

It is established by Defendants' Exhibit H that El Paso has, in fact, 22,938,309 outstanding shares, and that one-half of one per cent of them equal 114,691 shares.

My arithmetic may be subject to correction.

It is also established on the record that the current market value of El Paso stock is $22 a share.

It is apparent, therefore, that persons that have a substantial ownership in El Paso stock valued at up to 2,523,-[fol. 454-489] 202 at current market prices would have no restrictions whatever on their ownership of a similar proportion of New Company stock.

This is affirmed by Mr. Boyd's testimony that appears on Page 152 of the transcript.

"Question: And unless he were an officer or director, there would be no restrictions at all on this individual if he owned one share less than that represented by one-half of one per cent of the total outstanding El Paso shares?

"Answer: That's right. That's what we proposed."

Certainly we think such a person would be interested in voting his new company shares in such a manner as not to jeopardize so substantial an investment in El Paso. He would be foolish to do so, your Honor.

Also, as we previously pointed out, the trust affects only a very few persons, 30 persons plus some members of the immediate family, out of the total 117,500.

We think that it would be contrary to all human experience to expect that the management of New Company would not be constantly aware of this very same fact, your Honor, the fact that the shareholders of New Company have an investment in El Paso that transcends in dollar value even the investment that they would have in New Company, and we think that this would probably have an [fol. 454-490] effect on the willingness of New Company's management to compete with El Paso.

The object of the divestiture is always to reestablish New Company as a competitor. We think that, even if the trust were an effective device to block off the trusteed shares from participation in the New Company activities, we think there would still be so many shares, about 95 per cent, outside the trust, and so many shareholders, about 117,470, outside the trust, that the trust itself would have no effect whatever in insuring any possibility of competition between the two companies.

Even at best, the proscriptive effect of the trust would be negligible.

However, we believe that the trust, as described in this record, contained in Mr. Boyd's testimony and Mr. Kayser's testimony, would be ineffective in preserving any competitive relationship between the two companies, even with respect to the few shares that are involved in the trust.

First, the trust relating to management shares would according to Mr. Boyd's testimony, last for ten years unless the officer or director retired sooner.

The trustee, according to a description of the trust given by counsel and by Mr. Boyd in their testimony, would hold the New Company shares attributable to El Paso's management for up to a ten-year period unless the El Paso [fol. 454-491] officer or director sooner retired.

Mr. Kayser has testified that there are a number of El Paso directors who have been with the company for a substantial number of years and, as shown by Defendants' Exhibit I, quite a number of these directors own very substantial amounts of El Paso stock.

Mr. Arnold owns 2,000 shares, Mr. Baird owns 4,000, Mr. Glassell owns 229,429, Mr. Kayser himself owns 115,116, Mr. Leon Payne owns 34,608, Mr. Perkins owns 10,000, Mr. Schneider owns 6,000, Mr. Steen owns 2,454, Mr. Wagner owns 4,427, Mr. Williams owns 90,318.

Under the trust plan these persons would be entitled to the corresponding shares in New Company proportionate to their ownership in El Paso. But these shares would be placed in the trust pending retirement.

As Mr. Kayser testified a number of these people have been with the company for very, very many years, and in time these persons will be able to retire. At that time, after many years of service in El Paso, they will be able to take up their New Company shares unincumbered and be able to vote them in an unrestricted fashion.

We think that after a human being has put in 20 or more years of service in El Paso on the Board of Directors, such persons can be expected to retain their very high degree

of loyalty to El Paso and to vote their New Company [fol. 454-492] shares accordingly. Also, the El Paso directors—

The Court: Some do and some do not. That sort of situation. Some will be fed up with it.

Mr. Lipson: I am sure El Paso has treated them well.

The Court: You paint a very dark picture of people's morality and law abiding tendencies, it seems to me.

Mr. Lipson: I think I am painting the very highest picture of loyalty of these persons to the corporation for which they worked.

The Court: This Court is going to have some restrictions, injunctive and otherwise, in a plan of this sort. There will be all kinds of injunctions about it, if this happens to go through in this way or any similar way. We have broad powers, and we put people under a decree as to what they can do.

Mr. Lipson: In fairness, your Honor, I think I should comment with regard to two of these directors, Mr. Glassell and Mr. Kayser. Each of them presently own more than one-half of one per cent of the outstanding shares. Therefore, even after they retire, unless they somehow own at that time less than one-half of one per cent of the shares, their shares would remain in the trust. The cutoff point is 114,691 shares.

But using Mr. Kayser as an example, if I may, accord- [fol. 454-493] ing to Government's Exhibit 1, which is the El Paso shareholder list as of April 24, 1964, Mr. Kayser was listed as holding 120,116 shares.

However, according to the Defendants' Exhibit I that was presented to this Court on December 2, 1964, Mr. Kayser has decreased his holdings by some method, gift, sale, or otherwise, to the point where he now holds only 115,116 shares. He has but to dispose of an additional 426 shares, and he will be eligible to receive personally the shares in New Company proportionate to his holdings of 114,691 El Paso shares the day after he retires.

I believe Mr. Kayser has testified that he is either the founder of the company or has been associated with the company ever since it was founded.

Also, while these El Paso management shares remain in the trust during the 10-year period, the management of New Company cannot help but be aware of the fact that the El Paso directors will be voting substantial blocks of New Company shares as soon as they retire.

It should also be noted that Mr. Kayser testified that even while the trust is in effect the managers, officers, and directors of El Paso would be entitled to receive dividends from their New Company shares.

This testimony was given on Page 89 of the record.

The New Company management would certainly act with [fol. 454-494] that fact always in mind.

According to Mr. Boyd's description of the trust, it is clear that the trustee would have no power to sell except at the direction of the beneficiary, thus, even while he continued to be an El Paso officer and director, an individual could exercise some influence on New Company by trading his New Company shares. This is apparent from the record at Pages 84, 89, and 88.

Now, with respect to the second half of this trust, your Honor, the half represented by the large stockholder shares, this half of the trust, we think—by the way, it is described at Page 153 of the transcript—I am sorry, between Pages 134 and 153 of the transcript.

Generally, we think that this half of the trust has all the same infirmities the first half had—they share them with the first half of the trust, but they have some of their own. It has these additional defects:

This half of the trust will not terminate at the end of ten years. That is clear. In fact, it may never terminate. It could last for 20, 50, 70 years, or it could be perpetual.

Let me illustrate, your Honor. First, the shares that are to be placed in the second half of this trust are New Company shares in excess of the one-half of one per cent

feature. So long as a person continues to own one-half of [fol. 454-495] one per cent of El Paso shares or more, his New Company shares will remain trusteed. Since there is no obligation that the beneficiary sell his El Paso shares or that he direct the trustee to sell his New Company shares, it is clear that the trust can run on indefinitely so far as that individual is concerned.

As Mr. Boyd has testified on Page 135 of the transcript, the large stockholders' shares would be held by the trustee "so long as their ineligibility existed."

Another example, your Honor: There are at least two large funds, an El Paso Savings Fund, and an El Paso Retirement Fund. Together these funds have, according to Defendants' Exhibit I, 254,796 shares of El Paso stock. If we add to that the 25,000 shares of stock, of El Paso stock, held by the Kayser Foundation, this will bring the total up to 279,000.

These three funds would, of course, be entitled to an interest in a proportionate share of New Company stock.

None of these three funds, so far as we know, has a terminal date. Two of them we know for a fact do not have a terminal date, and, since they may retain their El Paso shares without any limit as to date, the corresponding trust of New Company shares could continue for the same indeterminate period.

In fairness, your Honor, both to the Court, El Paso, [fol. 454-496] and the Government, all deserve an end to this litigation some day, and we don't see it if the trust would continue in this vein.

The Court: I think the opening day of these hearings I was threatened at once that somebody would be quick to act if I didn't rule in his favor. Let us not get into that area again.

Mr. Lipson: No, I didn't, your Honor. If I over-stepped myself in any regard, I apologize.

The Court: No, you didn't.

Mr. Lipson: We also think that individuals like the Fish Estate or like Mr. Kenneth Adams could retain their one-

half of one per cent block of El Paso stock for many years, could pass it on to future generations in the same large block, and thereby acquire an indefinite trusteeship of the competing New Company shares. We think that allowing [fol. 454-497] persons identified with El Paso to participate in stock ownership in New Company by this trust device defeats the very purpose of divestiture and imposes a real regulatory burden on the Court and on the Justice Department to oversee this trust. Mr. Boyd conceded on the witness stand that the trust arrangement could easily last for fifty years. And I refer your Honor to page 145 of the transcript.

With respect to the method of distribution of shares proposed by El Paso, I believe Mr. Kayser testified that the principal concern of El Paso was to ease the tax burden as much as possible. Yet, it's also clear that the method that would eliminate the tax burden completely, the direct distribution of shares to the El Paso shareholders, was not the method that the El Paso people have determined upon. They have determined upon a possible combination of other methods that would involve a sale and would in fact incur substantial amounts of taxes.

The Court: I think the fair way to put that is if a plan can be devised to comply with the mandate of the United States Supreme Court and Section 7 of the Clayton Act and the legislative purposes which underlie it, in the public interest, saving $26 million in capital gains taxes for the two combined corporations is certainly in the public interest. It will strengthen both and strengthen the New Company.

[fol. 454-498] I don't believe we cast stones at El Paso because it wants to save those capital gains taxes. I think that's an important consideration in a lawsuit, because I think it is in the public interest to keep both of these concerns strong, and $26 million to me sounds like quite a little sum of money.

Mr. Lipson: There's no question, your Honor, that it's an enormous sum of money; but El Paso seems to be ready under its divestiture plan to distribute its stock in such a way precisely as to incur those taxes. And I refer your Honor to the testimony given by Mr. Boyd on this very subject.

The Court: Well, if what you've been talking about as a plan up to this moment would save the tax distribution of New Company stock, the same proportions as the shareholders of El Paso hold El Paso's stock would save that capital gains tax.

Mr. Lipson: I'm no tax lawyer, but I understand, your Honor, that there would be no tax involved in a transaction of that nature.

However, El Paso has not limited itself to that kind of transaction, your Honor, and they're also considering a rights offering. Under a rights offering they would incur substantial taxes.

The Court: I think that's right.

Mr. Lipson: There would be an enormous tax burden. [fol. 454-499] In fact, your Honor, so far as I can determine, the tax burden that El Paso would incur by the rights offering to its own shareholders would be the exact same tax burden that it would incur if it made a public offering of these shares to the public at large, including everybody but the El Paso shareholders, or including everybody—

There would be no difference so far as the tax effect is concerned.

The Court: I don't know whether you can say there would be no difference, but I see your point.

Mr. Lipson: Thank you, your Honor.

The Court: Rights offering is selling the stock.

Mr. Lipson: Yes, sir.

The Court: But, of course, there's—I don't think it would be the same. There would be some tax involved.

Mr. Lipson: In any event, I hope we can call on the services of the Internal Revenue people, if it becomes necessary.

The Court: I just eliminated the intervenors here. I don't want that Bureau of Internal Revenue to come downstairs. They're close enough, as far as I'm concerned. They're up on the third floor—fifth floor—of this building. Well, go ahead.

Mr. Lipson: Your Honor, I am extremely conscious of not wanting to trespass into a prohibited area, but I think [fol. 454-500] it's fair to observe that with respect to the alternate matters we discussed yesterday, at least one plan purports to save the tax burden completely. And I would just like to make that observation.

The Court: Which one?

Mr. Lipson: Which one? I believe it's the plan that Mr. Conkling would have testified to, Mr. Roger Conkling.

The Court: How would that come about? Tell me about that.

Mr. Lipson: Your Honor, I could only do it with reference to the testimony that Mr. Conkling had prepared, and I would be glad to submit it to your Honor as an offer of proof.

The Court: Well, my understanding about that is, from the indications you've given, that there are about three groups connected in Wall Street. Blythe & Company is one of the Wall Street bankers that's interested. The others I don't know. But what they're talking about doing is buying the assets of the spin-off here. If they bought the assets we spin off, there wouldn't be a tax-free situation by any means. And then they propose to set up a new company. And what would take place from then on would be highly speculative at this juncture. That's why I suggested yesterday to embark on those avenues would lead us into all kinds of further investigation and inquiry [fol. 454-501] and testimony. That's why I suggested that it's at this juncture collateral, at this juncture a diversion, at this conjuncture premature. I don't care if you want to talk about it a little bit, but I don't want to hear those witnesses yet, and I'm not going to put any shackles on your presentation.

Mr. Lipson: Thank you, your Honor. I merely wanted to make that observation, because the Government doesn't sponsor Mr. Conkling's plan, as it doesn't sponsor any of the others.

The Court: But it sponsors a plan by which the assets are sold to some new concern. The assets are sold to some new concern. That's your proposal.

Mr. Lipson: In part, your Honor.

The Court: That sounds like the three proposals that you referred to, and it is in line with Paradox's position here, as I understand it, and it's in line with Mr. Paul Cannon's client's position in here. And I'm not clear that any of those would be in the public interest. Now, it would take quite a little inquiry before we could find out who is involved and what is proposed and the ramifications and implications.

Well, I don't need to spell that out to you any more. I've told you two or three times. I don't mean to close you up now if you want to say a little about it.

[fol. 454-502] Mr. Lipson: Well, I just wanted to refer your Honor to the discussion that we just had about the Reading device. Now, as I understand that, that was a type of spin-off that was perfectly accepted by the Supreme Court. I think that would probably be an acceptable device under the standards laid down by the Supreme Court. Certainly, it requires much more than El Paso has offered.

The Court: What that induces in one phase of it, as Chief Justice Taft pointed out, is a little trading in the shares of Reading. It might encourage a little fast and rapid exchange of shares or transfers of shares on the market, shares of El Paso, shares of New Company.

One of the proposals, in Taft's analysis was the fellow who received the certificates in coal company might get rid of his certificates in the railroad company.

Mr. Lipson: That's correct, your Honor.

The Court: And if he got rid of it, of course, there would be some trading on the market.

Mr. Lipson: I'm sure that would be true.

The Court: I think there are some possibilities in this thing that need prospecting, and that's what we'll do after you folks get through with whatever you want to say.

Mr. Lipson: I would merely wish to make one further observation, based on the brief submitted by defense counsel this morning. Although I haven't had a chance to [fol. 454-503] examine it in detail, defense counsel did remark that in some Federal Trade Commission matters a spin-off of the type I presume that El Paso is currently advocating was sanctioned. Of course, as counsel recognizes, Federal Trade decisions are not the standard for this court. The Supreme Court sets the standards here. But even with respect to the Federal Trade Commission decision that he referred to, and quoted on page 12 of the brief, the initial language—that's the Clorox decision—states:

"Recognizing that the purpose of a Section 7 proceeding is in no sense punitive, that the sale of an absorbed firm may be difficult to accomplish within a reasonable period of time—"

And then it goes on to discuss other aspects of it. It's clear that in that case there may have been a problem about the sale of the absorbed concern within a reasonable period of time. It's just that it certainly isn't established here yet that there is a similar problem.

Thank you, your Honor.

The Court: Yes, sir. You've been here very helpful, Mr. Lipson.

Mr. Lipson: Thank you, your Honor. Thank you very much, your Honor.

The Court: And Mr. Harrison has been very helpful. You're making it very difficult for me, the both of you.

[fol. 454-504]

FURTHER ARGUMENT BY MR. HARRISON ON BEHALF OF EL PASO

Mr. Harrison: Your Honor, I would like very briefly to discuss a few matters that counsel mentioned. I understood him to say, and I could hardly believe my ears, that there have been no cases to date in which the Supreme Court has upheld distribution of stock in this manner. He cited two cases that were also cited in the Union Pacific case. And he comes down to the duPont case as though that were authority for the same proposition. But as he noted a little later in his discussion, there were 230,000 shares of duPont involved in a distribution to the stockholders of duPont, which the Supreme Court approved and which the Department of Justice did not contest.

Now, he seeks to contrast these 230,000 stockholders with ours, saying that it is a wider distribution in that case than it was here. And, your Honor, our distribution isn't very wide. And then he proceeds to criticize our proposal because, says he, there are so few important stockholders here. Only less than one and one-half per cent, as though we'd be much better off if we had a lot of great big stockholders owning two or three or ten per cent. What we apparently consider the virtue of wide distribution and dispersion, he considers concentration. Then when we got in court and show to you there are only a handful of people that own as much as one and one-half per cent of a corporation, somehow or other that seems to be a vice instead of a virtue.

[fol. 454-505] Then he turns to 85,500 stockholders owning 100 shares or less. And then he contrasts that as 73 per cent of the persons involved. And then he says that they account for 18 per cent of the ownership.

He ends up, in any event, with 31,905 people owning only two per cent. 31,905 people I thought was an awful lot of people, your Honor. It doesn't look like much concentration to me. It certainly doesn't look like the 230,000 we talked about in duPont. But it's still 85,500 people, and that's an awful lot of people.

And then he says that 103,000—no, he deletes that, and he says 88 per cent owned 32 per cent of the shares. I kind of lost him there.

The stockholders owning 200 shares and less were 14,000 in number? Is that it? And they constitute 12 per cent.

Well, I still find myself dealing with awfully large numbers of people.

At any rate, eventually he comes down to the real drive-home figure, and that's that 1,625, which they own such a large—45 per cent of the firm. As pointed out this morning, he would more correctly point that out as 2,200 people. That, again, looks to me like awfully wide dispersion.

I listened to a good many other criticisms of minor details in the company's plan, and I couldn't help but conclude [fol. 454-506] that—I don't think there's any plan for distribution to the stockholders of El Paso that would have passed the test which would be laid down by counsel here today.

He even despaired of what would happen when the officers of El Paso should retire. He's afraid that Paul Kayser is going to retire. I can assure him that Paul Kayser is not going to retire. So he will not be visited by that disaster. I suspect that some of the others are not going to retire very early. And so retirement, I don't think, will be a serious problem for him.

After all, it seems to me we have to approach this question of dispersion with a little common sense; and I think anybody with just a little common sense has to distort figures pretty vigorously in order to say that the shares of stock of El Paso are not widely dispersed; as, again, counsel said they were when he pointed to the security and office of the—present directors and officers of El Paso. And as I said this morning, that same security will exist for the New Company, again, very largely because of that very wide dispersion of stock ownership.

This is a practical truth in business that the Court knows and everybody in this court room knows.

On the other hand, we all know, too, that even when employees and directors of El Paso retire, with all of their loyalty to El Paso, I assure your Honor that the loyalty [fol. 454-507] will wane if the dividends wane. I assure you that they, like all of the other stockholders of El Paso, would like to see the dividend maintained and increased. They'd like to see El Paso's business prosper and enlarge. They'd like to see it vie for future competition. By the same token, the shareholders of the New Company, whether they be also the shareholders of El Paso or not, will love that company and portray the utmost loyalty if they have the dividends; and without dividends, they won't.

The Court: Well, now, we have an engineer. Where are we with that problem? Have you completed that investigation of the exhibit?

Mr. Harrison: Oh, yes. We will be ready at ten o'clock tomorrow.

The Court: You can't do it this afternoon?

Mr. Harrison: Well, they were not ready a short time ago. I can inquire and see if we can get them over or not.

The Court: Well, by the time he got over here, it would be four o'clock. Recess until tomorrow morning at ten.

(Whereupon Court was recessed until tomorrow morning, December 10, 1964, at 10:00 a.m.)

[fol. 454-508]

Transcript of Proceedings

December 10, 1964, 10:00 a.m.

Mr. Lipson: May it please the Court, Government is now ready to resume its examination of Mr. Riggs. Mr. Harrison has completed his examination.

Mr. Harrison: Yes, your Honor.

Mr. Lipson: Mr. Riggs.

Roy B. Riggs, Jr. recalled as a witness on behalf of the Plaintiff, having been heretofore duly sworn, testified further as follows:

Further direct examination.

By Mr. Lipson:

Q. Mr. Riggs, would you describe to the Court each step of the procedures that you followed in preparing your study?

Mr. Harrison: Well, if your Honor please, I was of course examining this witness on voir dire and I intended to ask him that very question.

The Court: Well, he's already been asked it now. It doesn't matter who asks it.

Mr. Harrison: That's true.

Mr. Lipson: Your Honor, I would prefer to hold the offer of 19 until I've laid a firmer foundation for the offer.

The Court: All right.

Mr. Lipson: I will reoffer the exhibit subsequently. Will you please read the question?

[fol. 454-509] (Question read.)

The Witness: Yes. If I may refer to my notes for dates. Our firm, James A. Lewis Engineering, was approached by the Oregon Public Utilities Commission on November 17, 1964, with the request that we review the reserves and de-

liverability calculations that had been submitted by El Paso under their plan of divestiture to see whether or not in our opinion these were valid reserves and deliverabilities. They made, as I understand, the arrangements for us to obtain the basic data by which we could make these calculations from Tennessee Gas Transmission Company. As I understand, they did not have this information, the Oregon Public Utilities Commission did not have this information, in his own hands. He requested it earlier, but had not received it from El Paso.

We visited on November 17 with the Tennessee people. They provided us with basic information which they had extracted from the public record of the New Mexico Oil & Gas Commission, these being the pressures and production and deliverability tests that are in the public records for these specific properties, and with also a list of these properties. In addition, they gave us their impression of the reserves and the deliverabilities—rather, just the reserves of these properties.

Now, following the obtaining of this basic information we returned to Dallas and set our staff to work, using the [fol. 454-510] basic information, to plot the decline curves. All of these are in our work papers. To plot pressure decline curves. To make these deliverability calculations.

And on November 24—this was the following week—the Oregon Public Utilities Commission made arrangements for us to visit with the engineers of El Paso, which we did in their office in El Paso, with Mr. Derrick. At that time they also gave us a copy of their reserve study and their deliverability calculations, which also had this same property listing, which we checked to be essentially the same. There were some areas that I couldn't reconcile completely, but it essentially the same property.

So with that background, the steps in our calculation were first to plot the pressure decline curves for each of these gas wells, about some 700 wells. After having done this, we drew pressure decline curves through the ones that lent themselves to this. It turns out that using this method,

some permit you to draw valid conclusions as to gas in place, and some do not. In other words, sometimes the pressure points are aligned so that you can draw a reasonable line through them, and sometimes they do not.

The ones that did not permit this, we then looked—spotted—looked to see on a map how they might reasonably be expected to perform on the basis of control points for the wells around that did have valid pressure declines. For [fol. 454-511] the properties that had no wells on them at all, the undeveloped properties, then we used essentially the same method to see what reserves might be attributed to those by looking to the control areas where there were developed wells, properties with wells on them that had valid pressure declines.

Now, we compared this with the Tennessee interpretive data and with the El Paso interpretive data, and it develops—I hope I'm not getting ahead, but I think this is all part of the story—it developed that through our independent look at this, we have agreed almost entirely—I think there was about maybe a five or six per cent difference—almost entirely with the values that this other interpretive study had. We looked at it. We didn't rely on it.

By Mr. Lipson:

Q. The other study you're referring to is the Tennessee study?.

A. Yes. And on the other hand, we at the same time in this study looked at the El Paso study and had opportunity to talk with their engineers about the basis for their study and found several areas of—in which we were in serious disagreement with the principles that they had applied to find the reserves.

Now, these were all in the areas of where there was an uncertainty about reserves. In other words, where there was not a good valid decline in pressure for a well or in areas where there was no well and you had to make some basis for estimating what reserves would be there when and [fol. 454-512] if they did drill a well.

Now, we made subsequent studies, but basically these are steps we would draw in our reserve study. We also made an economic study and a deliverability study.

[fol. 454-513] Q. Would you just explain to myself and to the Court what a "pressure decline" means in lay language?

A. Theoretically, if you were to have down in the ground a gas reserve that was completely closed and you were to withdraw gas from this, then it is a basic law of physics that the pressure declines in proportion to the withdrawal of gas, corrected with the gas deviation factor. It is a direct line. Or, restated, if you were to make a plot of the pressure at a given gas production so that you had a series of pressure declines at subsequent cumulative gas withdrawals, if you were to extrapolate these to the zero pressure, then that would give you the amount of gas that is in place. This is the so-called pressure decline method of determining gas reserves, and it is almost universally concluded by petroleum reservoir engineers that this is the reliable method, rather than the volumetric.

Q. In preparing petroleum engineering studies of the nature that you have described, generally is it a usual and accepted practice in the industry to rely on tabulations of basic statistical data prepared by other production companies?

Mr. Harrison: I object to that, if your Honor please, because, as a matter of law, this witness is not entitled to go and extract data respecting our company from third persons on hearsay and predicate opinions on them, and the witness has no right to express his opinion on that [fol. 454-514] question of law, and it is going to be one of the bases for excluding this testimony.

Mr. Lipson: Your Honor, the question was with respect to the industry—excuse me, your Honor—the question was with respect to the general practice of petroleum engineering.

The Court: Let me hear the question.

Mr. Lipson: Would you read the question.

(Question read.)

The Court: That is hearsay, isn't it? Objection sustained.

Mr. Lipson: Your Honor, may I make an observation that the data are included in the work papers supplied by this witness to the El Paso people. If there are any errors in the figures, they can be brought out.

The Court: All I did is sustain an objection to that question.

By Mr. Lipson:

Q. Based on your previous experience in the San Juan Basin, Mr. Riggs, how does the accuracy of your study conform with the accuracy of other similar studies that you have supervised in the San Juan Basin?

Mr. Harrison: I object to the witness' opinion concerning other people's studies which, in fact, he used here, as immaterial, your Honor.

The Court: Sustained.

[fol. 454-515] By Mr. Lipson:

Q. In your professional judgment, Mr. Riggs, as a petroleum engineer with experience in the San Juan Basin, do you have any reason to doubt the accuracy of the basic data on which you relied?

Mr. Harrison: Now, if your Honor please, we are getting data as to which he has no reason to doubt the effectiveness of without any basis whatever.

The Court: Yes. I don't know what you are talking about now. That is just a big, wide question and doesn't inform me at all about what you are talking about.

Mr. Lipson: May I explain, your Honor. The witness has previously testified on the earlier day that he has conducted several other studies in the San Juan Basin for other clients in other matters not related to this case, and from that he would be in a position to make a comparison

of the accuracy of the present study with the other studies that he did in fact conduct. I am merely asking the witness at this time to make this comparison to determine the accuracy of this study.

Mr. Harrison: I submit no study of the Tennessee Natural Gas Company is before this Court, and this witness is attempting to validate the study made by an adversary, the Tennessee Natural Gas Company, in another proceeding. If the Tennessee Natural Gas Company wants to appear and testify, let them appear.

[fol. 454-516] The Court: Is this what you are doing? Is this the Tennessee Valley study?

Mr. Lipson: May I explain, your Honor.

The Court: Surely.

Mr. Lipson: The witness has testified that he was approached to make this study a relatively short time after the October 19 hearing. I understand that it would be an impossible feat in a time shorter than about a four-month period to actually extract—

Mr. Harrison: May I interrupt at this moment, your Honor. I am going to cross-examine this witness, and I object to counsel's making a statement of what the witness' answers will be on cross-examination.

Mr. Lipson: I am responding to His Honor's inquiry. The time to make—

The Court: It might be a good idea to let the witness testify, Mr. Lipson. I want to hear your explanation but here you have this engineer sitting there, and Mr. Harrison's objection really, as he pointed out, is that you are advising the witness what you want him to say after awhile, you know, I think—

Mr. Lipson: If I may approach the bench, your Honor.

The Court: Well, maybe we ought to let Mr. Harrison have an opportunity to cross-examine this man without [fol. 454-517] having you tell him how to answer.

Mr. Lipson: That wasn't my intention, your Honor.

The Court: I know it wasn't your intention, but it is the necessary result of what you are going to do, I think. You

are explaining to me, and the witness is sitting there taking it all in. He is getting instructed now. We don't like you to instruct the witness even out of the presence of the Court, but to let you do it here when he is about to be examined on this subject is, I believe, taking—I don't mean to say that you mean to take unfair advantage, but I think the result is it gives an unfair advantage.

The man is entitled to cross-examine this fellow and find out firsthand where he is sitting up there, the bright sunlight shining on him, the Court is here listening, and counsel asking piercing questions, and see how he stands up under that sort of thing, you know. That is part of the process.

Mr. Lipson: I understand that, your Honor.

The Court: That is one of the guarantees of truth and reliability, and we lose that if counsel is given an opportunity to stand up here now and instruct him.

Mr. Lipson: If your Honor prefers, we can approach the bench out of the hearing of the witness and explain the answer to your Honor's inquiry.

The Court: Suppose you both come in chambers a minute. [fol. 454-518] I don't like this whispering.

(The following proceedings were had in chambers.)

Mr. Lipson: Your Honor, as we understand it, this witness was approached by the Oregon Commission people shortly after your October 19 hearing.

The Court: What was this October 19 hearing?

Mr. Lipson: This was the hearing at which El Paso introduced into evidence the El Paso divestiture plan, your Honor. It was the last hearing just prior to—

The Court: Out in the courtroom?

Mr. Lipson: Yes, your Honor, out in the courtroom. At that time you stated that you would rule December 2 or thereabouts on the motions to intervene.

In that relatively short span of time I understand it would have been impossible to conduct anything like a full geologic survey even of the limited Mesa Verde Horizon in the San Juan Basin area.

Principally the time-consuming part of the job would be extracting the New Mexico Commission figures and tabulating them in an appropriate form so that they could be evaluated by the methods normally used in the petroleum engineering profession, including the use of computers.

The tabulations, I understand, of these basic data had already been prepared by the Tennessee people, and it was on the transfer of girues, which I understand is a clerical transfer, of the New Mexico figures to the Tennessee [fol. 454-519] tabulation sheets on which Mr. Riggs relied for the rest of his study. The rest of his study was not a Tennessee study at all. He didn't rely, as I understand it, on the interpretive section of the study, but has made his own inquiries. And in order for the study to have been of such completeness on Mr. Riggs' part that he himself would have extracted the figures originally, and so forth, it would have taken a period in excess of four months, and the cost would have been astronomical from our viewpoint, about $60,000, and we just don't have funds to dispose of in that way, one-tenth as much, your Honor.

So this is the situation we are faced with, the best that we can do.

I can see, Mr. Harrison, that it is perhaps not the best that would be possible under the ideal circumstances, but in view of the fact that his work papers are available, that the tabulations on which he has relied to the extent he has relied on them have been made available and any mistakes in the figures can easily be determined and pointed out, we think he can go ahead and give his testimony based on the material he has relied upon.

Mr. Harrison: Let me tell you my side of the story, your Honor.

This fellow is a liar. He took the stand and said, "This is an independent study of my firm and me." [fol. 454-520] He said that he took the information directly from the New Mexico records and, if I hadn't started to cross-examine him and gotten these files, that testimony would have gone in as a bona fide study by this man.

Now, the Tennessee Natural Gas Company is a deadly enemy of El Paso. It has been fighting it for years and is engaging in a controversy before the Federal Power Commission endeavoring to prove that the reserves of the San Juan Basin will not support El Paso's present commitments to California. And that was the purpose of the collection of this evidence to be presented to the Federal Power Commission, to prove that the San Juan Basin reserves were no good. So he gives it to our adversary secretly, and he didn't tell us on the stand or any other time. And he takes the figures from our adversary in another proceeding to prove, as an impartial and independent study, what the fair reserves in this basin are.

I will prove a lot more on cross-examination. I will prove that he took all sorts of information inaccurately from Tennessee and ignored any information he obtained from El Paso. I will show he depended upon the conclusions, and in 500 cases out of 800 he accepted the identical conclusions of well reserves to the four points and drew his line right through in the point where every single one of the estimates of Tennessee was.

[fol. 454-521] I am going to prove that this is Tennessee's study and it is not his study. It is a fake.

Mr. Lipson: I have no dispute about what Mr. Harrison may want to bring out in cross-examination, and it is certainly his right to do so. I would merely like to be able to get the basic data in through direct, and it would be subject to cross-examination.

Mr. Harrison: The basic data takes up half a room. It is out there, and it is all inaccurate.

The Court: What we are going to have to do with this kind of a controversy—that is, as Mr. Harrison states it, this is a red hot controversy over the admissibility of evidence, and I am going to have to rule on that on its merits as it comes along, that is to say, whether it is hearsay or whether it falls under any other exclusionary rule. We will just have to meet those questions. I can't tell you in here, either of you, of course, anything about it. I will rule on

those. As I said a minute ago, all I did was sustain the objection to that question, and I think that question was objectionable. It was hearsay.

Now we are going to have to handle each of these questions in that way. Wherever the axe falls, of course, that is where it falls. I will attempt, to the best of my ability, to rule on those things, each one as it comes along, on the basis of the exclusionary rules; and you may be in some [fol. 454-522] trouble on your hearsay, and you may be in some trouble on the best evidence rule. You may be in some trouble on the conclusions this fellow is drawing from somebody else's study, not his own. I think I understand you both.

This fellow said a minute ago, you know—I thought that was very damaging. I had a notion to—damaging to his testimony—I had a notion to verify it by asking him a question.

But he said that his differences and Tennessee's differences necessarily, because he was going along with Tennessee— Well, first, he said that his study and Tennessee's study were right on the nose. Now you tell me why. Then he said that there were serious differences in his study with the study of El Paso. But then he said those differences were in the areas where it was extremely difficult—where it was extremely difficult—he didn't use that term—to make any determination.

In other words, I gathered from his testimony it was highly speculative, guesswork. Now, that is what he said.

When you get your record, you will see that he said something very much like that I just stated, that where there were serious differences, those differences were in areas where it was extremely difficult to conjecture. And of course that makes his testimony of little value to me on [fol. 454-523] the differences, because, if it is in areas where nobody can make a decent determination—and that is my interpretation of what he said, and I think you will find that—

Mr. Lipson: I understand that, your Honor.

The Court: That is what he said, isn't it? Did you understand that?

Mr. Lipson: That is genefally my understanding also, except that apparently somebody has to make the determination in those areas because El Paso is making it also in its Defendants' Exhibit A on Tab 7.

The Court: Well, they are educated guesses apparently in some areas, and I guess we have to take the best educated guess we can get.

You get up and controvert it, El Paso, with an expert who says, "Well, these are terribly serious differences"—and I was listening to this very carefully—very serious differences. And then he nullified the force of his testimony by saying, well, this was in areas where nobody really could make a decent determination.

Well, be that as it may, we are going to have to—you offer it, of course, and I will have to—you object, and I will have to rule on each objection on each question as it comes along. And we will just do the best we can with that. I don't know where we are going to come out.

Generally I try not to get in the way of the introduction [fol. 454-524] of evidence when we do not have a jury around. This now appears to be a rather crucial thing, so we will handle it that way.

Is there anything else you want to say?

Mr. Lipson: No, your Honor.

The Court: Either of you?

Mr. Harrison: No, your Honor.

The Court: All right.

[fol. 454-525] By Mr. Lipson:

Q. Mr. Riggs, had you yourself accumulated the basic statistical tabulations, about how long a time would that have taken?

A. For the 700 wells involved I would estimate, our staff —and I'm sure that's what you mean, in our normal procedure have accumulated these—it would have—oh, perhaps ten to twelve man weeks of time.

Q. And what would the cost have been approximately?

Mr. Harrison: I submit that's immaterial, if your Honor please.

The Court: Yes, it's immaterial.

By Mr. Lipson:

Q. In your professional judgment, Mr. Riggs, as a petroleum engineer with experience in the San Juan Basin, do you have any reason to doubt the accuracy of the basic data on which you relied?

Mr. Harrison: I submit that's irrelevant, incompetent, and immaterial.

The Court: Sustained.

By Mr. Lipson:

Q. Mr. Riggs, with respect to the entire Pacific Northwest reserves in the San Juan Basin, what per cent do the Mesa Verde reserves represent?

Mr. Harrison: I submit the witness has not qualified himself to give that information. He has collected no data whatever.

Mr. Lipson: I believe he's testified, your Honor, that he [fol. 454-526] has conducted surveys to the El Paso papers and through other sources as well. This is apart from the Tennessee matters.

The Court: I know. But it's—I don't know what he knows about Mesa Verde.

Mr. Lipson: I believe the witness has testified previously that his entire study has been with reference solely to Mesa Verde.

By Mr. Lipson:

Q. Is that correct, Mr. Riggs?

Mr. Harrison: Well, the record shows that. Now, he's going beyond Mesa Verde.

The Court: He's comparing Mesa Verde with the San Juan Basin, I take it.

Mr. Lipson: Yes, your Honor, with the total San Juan Basin system reserves.

The Court: Overruled. You may proceed. Go ahead.

Mr. Lipson: Would you read the question, please?

(Question read.)

The Court: Now, I'm not sure I understand that question. Read that again.

(Question re-read.)

The Court: All right. Go ahead.

The Witness: Based on the—

The Court: If you know. Do you know?

The Witness: Yes, sir.

[fol. 454-527] The Court: All right.

The Witness: They represent about 73 per cent of the total San Juan Basin reserves that El Paso has ascribed to these properties.

Mr. Harrison: That's not any answer to the question. I move to strike it.

The Court: That's not the question. You're not answering the question. Now, listen to that question.

Mr. Harrison: I move to strike the question.

The Court: You mean the answer?

Mr. Harrison: The answer.

The Court: Yes. I think the answer should be stricken, because you're talking now about something else. Read the question to him.

(Question re-read again.)

The Court: Now, do you understand that question?

The Witness: Yes, sir, I think I do.

The Court: It's the Pacific Northwest reserves.

The Witness: Yes, sir. That's what my answer was directed to.

The Court: Well, it's not at all. You were talking about El Paso reserves.

The Witness: About 73 per cent.

Mr. Harrison: I move to strike the answer.

The Court: Why?

[fol. 454-528] Mr. Harrison: Because the question asks for percentage of Pacific Northwest reserves in the total basin. And he answered 73 per cent represented the percentage of El Paso.

Mr. Lipson: Your Honor, the witness did not testify to that.

The Court: All right. Read the answer. I think he did.

(Record read.)

Mr. Lipson: I think I may clear this up by a question or two.

The Court: Rephrase your question.

By Mr. Lipson:

Q. The 73 per cent to which you refer, is that the El Paso reserves or the New Company reserves, according to the divestiture plan.

A. These are the New Company reserves, according to the divestiture.

Q. What method did you use in determining your reserve estimates for developed wells?

A. For developed wells, I used the pressure decline method, where the pressure declines were adequate to permit this type of reserve estimate.

The Court: I want to go back to this question we were having some difficulty about. The Government complains that El Paso is not giving New Company enough of the reserves down in the San Juan Basin. Now, do you mean to tell me that El Paso gave them 73 per cent of the [fol. 454-529] reserves, and you still complain that that isn't enough?

Mr. Lipson: Your Honor, may I respond to that?

Mr. Harrison: I submit the witness should respond, if your Honor please. This 73 per cent—I don't know what the 73 per cent is.

The Court: I don't know. You say that that 73 per cent is the New Company share of the San Juan reserves of El Paso. Is that right?

The Witness: No, sir. The 73 per cent represents the portion that the Mesa Verde reserves of the New Company bear to the total San Juan Basin reserves of the New Company, as expressed in El Paso's plan of divestiture.

The Court: All right. I understand it.

By Mr. Lipson:

Q. Did you rely on any other methods in determining the reserve estimates for developed wells, other than you've just described?

A. For the developed wells—the answer is yes. For the developed wells that would not permit the pressure decline extrapolation, I then relied on the control afforded by the nearest developed well that would give this pressure decline extrapolation.

Q. Is that an accepted approach in the industry?

A. Yes. It's an accepted approach.

Q. Do you know the method used by the El Paso engineers?

[fol. 454-530] Mr. Harrison: I submit that the—well, I withdraw it.

The Witness: I had a conversation with the El Paso engineers, and I had an understanding of what they told me.

By Mr. Lipson:

Q. How does your method compare with the method used by the El Paso engineers?

A. It's different.

Q. In what respects?

A. For the developed wells our method was identical, so far as I can tell, where there was sufficient pressure information to make an estimate by the pressure decline method. Where there was not sufficient evidence of a good,

valid pressure decline on a given well, El Paso used a method that they referred to as a factoring method. I don't—I wouldn't attempt to explain all the details in this method, but they did not use the control of the nearest well.

Q. Did your method involve estimating a reserve for the developed Pacific Northwest wells?

A. Yes.

Q. Did El Paso's—would you mind rephrasing that now? I don't understand the question.

Mr. Harrison: If you are asking him for an admission, I have no objection.

The Court: I think he's going to have to ask it again. The witness doesn't understand.

[fol. 454-531] By Mr. Lipson:

Q. I had previously asked you whether your method involved estimating a reserve for each developed Pacific Northwest well.

I'm now asking whether El Paso's method involved estimating a reserve for each developed well.

Mr. Harrison: This witness is not qualified to testify to the operations of El Paso Natural Gas Company. If he's asking for some admission, I have no objection.

The Court: I think so. Objection sustained.

By Mr. Lipson:

Q. Did the El Paso engineers with whom you had the conversation you referred to inform you whether El Paso's method involved an estimate for reserve for each developed Pacific Northwest well?

Mr. Harrison: I object.

The Court: You haven't laid the foundation for a conversation.

By Mr. Lipson:

Q. Did you have a conversation with the El Paso petroleum engineers, Mr. Riggs?

Mr. Harrison: I submit that the witness is being led now.

The Court: Oh, no. He's laying a foundation. He's entitled to ask whether there was a conversation with someone from El Paso.

By Mr. Lipson:

Q. Was there such a conversation?

A. Yes. I believe I testified earlier that I did have this [fol. 454-532] meeting with El Paso in their office on November 24, 1964.

Q. In what city?

A. In El Paso, Texas.

Q. And who was present?

A. Initially, our appointment was with Mr. Derrick, who had with him Mr. Lemon. Then Mr. Derrick put us in contact with one of the engineers on his staff, a Mr. Foy Boyd. And then subsequently with another engineer on his staff, a Mr. Fred Bernard, I believe the name is.

Q. How long did this meeting take?

A. Over a period of about—it started in the middle of the morning and concluded in the middle of the afternoon. And we had lunch in between.

Q. Were you informed at this meeting whether the El Paso method involved estimating reserves for each developed Pacific Northwest well?

Mr. Harrison: I object to the question upon the ground that the interpretation of the conversation is improper. If anybody made any statement, the witness can relate what was done and said at that meeting.

The Court: Yes. The way we proceed with this is, "Who said what," on that occasion.

By Mr. Lipson:

Q. Was there any conversation in that meeting with respect to the estimating of a reserve?

A. Yes. Of course, the purpose of our visit—

[fol. 454-533] Mr. Harrison: I move to strike the purpose of the visit.

The Court: Sustained. It is stricken. The purpose is irrelevant.

By Mr. Lipson:

Q. With whom was the conversation?

A. The conversation was with Mr. Boyd and Mr. Bernard.

Q. Do you recall the substance of that conversation?

A. Yes, I—

The Court: Which Mr. Boyd?

The Witness: Mr. Foy Boyd, sir.

By Mr. Lipson:

Q. Would you relate to the Court the substance of that conversation?

A. Our basic inquiry was to the method that they had used in determining these reserves, and they were quite open with us on this and produced a large volume of work papers. We specifically inquired as to several properties, and Mr. Boyd accommodated by explaining his method, which entailed a reserve estimate for each specific developed well, and also in response to our question actually enumerated these reserves for several areas in the field.

Q. Will you explain to the Court the use of township averages in estimating gas reserves?

Mr. Harrison: This witness has not testified about township averages, and he's given no testimony based thereon.

The Court: That's the first time I've heard that.

[fol. 454-534] Mr. Lipson: That's why I'd like an explanation of the term, so the Court can be informed what it means before we go into the details.

The Court: All right.

By Mr. Lipson:

Q. What does a township average mean?

A. A township is a measure of land in a normal—

The Court: I know what a township is.

The Witness: All right, sir.

The Court: Don't tell me what a township is. Anybody that's lived out in this western part of the United States—everybody knows what a township is. The roads are laid out along the lines of townships. Some of them are very sharp turns.

Go ahead.

The Witness: The 320 acre spacing of the Mesa Verde wells then gives you approximately 72 wells within a township. Now, in continuation of our conversations with Mr.—

The Court: That's two for each section?

The Witness: That's correct, sir.

Mr. Harrison: I submit that the witness has not been asked for a conversation. He's been asked for a definition.

The Court: Well, I suppose he's getting to that eventually. 36 sections. So you have two wells on each section?

The Witness: That's correct.

[fol. 454-535] By Mr. Lipson:

Q. At the meeting to which you've already referred with the El Paso engineers in El Paso, Texas, did you have any conversations with any of these engineers with respect to El Paso's use of township averages to determine the reserves of the Pacific Northwest developed wells?

A. Yes. I had such conversation.

Q. With whom?

A. With Mr. Foy Boyd and Mr. Fred Bernard.

Q. Would you relate to the Court the substance of these conversations?

A. Mr. Boyd and subsequently Mr. Bernard indicated that their reserve estimates for these former Pacific Northwest properties consisted of an average recovery, not the sum of individual well reserves that they had determined, but an average of all of the wells in that township, or that they had used in effect a township average for determining the reserves to the Pacific Northwest properties.

Q. Mr. Riggs, to what extent does the use of a township average in the manner you've just described affect the accuracy of a reserve estimate with respect to the Pacific Northwest developed wells?

Mr. Harrison: There have been no estimates laid before this Court based upon a township average that I know of, if your Honor please, and therefore nothing which is the subject of his testimony.

[fol. 454-536] Mr. Lipson: That witness has just testified to that, I believe. May the witness respond to the question, your Honor?

The Court: Overruled. Yes.

(Question read.)

A. It would tend to overstate the reserves that we assigned to these wells.

By Mr. Lipson:

Q. What method—

The Court: What—well, I guess I'd better keep out of this row. All right. Go ahead.

By Mr. Lipson:

Q. What method did you use in reaching your measurements as to the reserves of these Pacific Northwest wells?

Mr. Harrison: It's already been testified to, if your Honor please.

The Court: Yes, it's repetitious.

By Mr. Lipson:

Q. With respect to the reserves in the undeveloped acreage, how did you estimate the amount of reserves assigned to undeveloped acreage?

A. I made this estimate based on the control provided by the nearest developed well that had a valid pressure decline.

Q. How does that method compare with the use of township averages that you described previously?

Mr. Harrison: Comparing apples and oranges, I submit, your Honor please, if I understand the question.

[fol. 454-537] The Court: Read the question.

(Question read.)

The Court: By "that method" you mean what?

Mr. Harrison: Well, what I have in mind, if your Honor please—

The Court: No. I'm asking Mr. Lipson. What do you mean, "that method"?

Mr. Lipson: The use of the nearest control well.

The Court: All right.

Mr. Lipson: In order to assign a reserve—

Mr. Harrison: I object to the question upon the ground this witness has related no conversation in which any employee of El Paso Natural Gas Company said that undeveloped acreage was averaged on a township basis.

The Court: Yes. The evidence heretofore has been in reference to developed wells. Now, you're moving into the area of undeveloped wells.

Mr. Lipson: If I could back up, your Honor, I think I can take care of that problem.

The Court: All right.

By Mr. Lipson:

Q. In your conversations with the El Paso engineers in El Paso, Texas, that you described earlier, were there any conversations with respect to the methods used by El Paso to measure the reserves with respect to undeveloped acreage?

[fol. 454-538] A. Yes, there were conversations.

Q. With whom?

A. With Mr. Fred Bernard and Mr. Foy Boyd.

Q. Would you relate to the Court the substance of those conversations?

A. In response to my question as to the method of El Paso in determining reserves for the undeveloped locations, they explained that a reserve had been assigned to all of the undrilled acreage within a confine which we called the productive limit of the Mesa Verde horizon, which was exactly equivalent to the average of all of the developed wells within that same township or unit.

By Mr. Lipson:

Q. Mr. Riggs, how does the method that you used compare with the use of this township average that you've just described, with respect to the undeveloped properties, now?

A. The method that I used for these undeveloped properties resulted in a reserve estimate of about one-third that of the estimate which El Paso obtained.

Q. In your professional judgment is the use of township averages justified in measuring reserves in the undeveloped acreage?

A. No, it is not justified.

Q. Based on your findings, to what extent percentagewise, if I may use that term, has El Paso overestimated or [fol. 454-539] underestimated Pacific Northwest's Mesa Verde reserves?

Mr. Harrison: I submit that the witness cannot testify to El Paso's estimate, if your Honor please. This witness

is not speaking for El Paso and does not make a survey for El Paso; has not estimated anything for El Paso.

The Court: I understand, Mr. Harrison.

Mr. Lipson: Your Honor, El Paso's estimates are contained in Defendants' Exhibit A.

The Court: I know. That's the best evidence. You can't ask this witness what those exhibits show.

Mr. Lipson: Oh, your Honor, I'm not asking him to show that. I'm merely asking him the extent to which his findings exceed or are more than or less than the El Paso's estimates.

The Court: I know. But that's the point. You can't ask him about the document. It's in evidence. You can tell me about it. His estimates may be compared with El Paso's estimates on the basis of exhibits that are in evidence. I don't know whether his are in evidence yet or not.

Mr. Lipson: No, sir.

The Court: If that's what you're trying to do is get them in evidence.

Mr. Lipson: I'm trying to lay a foundation for them.

The Court: You're trying to get them in evidence, but [fol. 454-540] to do it I don't think you can use this comparison. Sustained.

By Mr. Lipson:

Q. Mr. Riggs, I show you Plaintiff's Exhibit No. 19 for identification. This is the exhibit you have previously identified, is it not?

A. Yes, it is.

Q. And the top section of it, referring to Lewis Engineers, summarizes your study about the Mesa Verde reservoir in the San Juan Basin.

A. Yes, that's correct.

Mr. Lipson: I would like to offer 19 at this time, your Honor.

Mr. Harrison: We'd like to proceed with the examination, if your Honor please. We object to it and ask an opportunity to examine the witness concerning the—

The Court: On voir dire?

Mr. Harrison: Yes.

The Court: All right.

Voir Dire examination.

By Mr. Harrison:

Q. Mr. Riggs, I am going to read a question and answer from page 164 of the record given day before yesterday. The following question beginning at line 11 was asked you:

"Question: What was the source of the basic material that you relied on in making these studies?

[fol. 454-541] "Answer: Our basic information was from the records of the New Mexico Oil & Gas Conservation Commission and from the work papers of El Paso Natural Gas Company."

You so testified, did you not?

A. That's my recollection, yes, sir.

Q. I again call your attention to page—

Mr. Lipson: May I interrupt at this time, your Honor. My page 164 does not agree with that.

Mr. Harrison: Oh, 364. I'm sorry.

By Mr. Harrison:

Q. Turning again to page 367 and beginning at line 5, the following question was asked:

"Question: What is the first step you took in obtaining the material which is basic to this exhibit?

"Answer: The first step, of course, was to gather the basic information.

"Question: What was that information?

"Answer: This basic information was the accumulation of the shutin wellhead pressures from each of these wells.

"Question: Where did you obtain that?

"Answer: I obtained it, it came directly from the files of the New Mexico Conservation Commission."

Were you asked those questions, and did you give those answers?

A. Yes, that's my recollection, Mr. Harrison.

[fol. 454-542] Q. Now, the fact is that all of that basic information was obtained from the Tennessee Natural Gas Company, is that not true?

A. It came to me from the Tennessee Natural Gas Company, who obtained it—

Q. Yes. I'm talking about you. It came to you, all of it, from the Tennessee Natural Gas Company?

A. Yes, I testified to that earlier this morning.

Q. It is true that it all came from the Tennessee Natural Gas Company?

A. Yes. The basic questions.

The Court: He's already answered that. He said yes.

By Mr. Harrison:

Q. All right. Now, when you obtained that information—by the way, when did you first talk to the Tennessee Natural Gas Company?

A. If I may refer to my notes again.

Q. Yes.

A. It was on November 18, 1964.

Q. And did you visit the office of the Tennessee Natural Gas Company?

A. Yes, sir. We visited on that day.

Q. And where is that located?

A. In Houston, Texas.

Q. And to whom did you speak there?

A. We spoke with a Mr. Harry Welch.

[fol. 454-543] Q. W-e-l-l-s, Wells? I didn't catch it.

A. Welch. W-e-l-c-h. I think it's W-e-l-c-h. Maybe perhaps it's "C-h". I don't know the exact spelling. A Mr. Charles Stamos. There were some other people there. A Mr. Ben Dalton, who was also present. And there were other people in and out bringing this information, but I don't recall their names.

Q. Now, had you arranged for that meeting before you visited the Tennessee Natural Gas Company?

A. Well, I hadn't arranged for the meeting, sir.

Q. Who did?

A. It was arranged for us by our client, the Oregon Public Utilities Commission.

Q. I see. And then you called up the office of the Tennessee Natural Gas and told them you wanted to come over and get some information; is that right?

A. Well, once again, I didn't make the call directly.

Q. I see.

A. The contact was made by other members in our firm.

Q. Now, at the time that you visited the Tennessee Natural Gas Company, did you know that it was engaged in controversies with the El Paso Natural Gas Company before the Federal Power Commission involving the question of reserves in the San Juan Basin?

A. I didn't know that prior to the meeting, but—

[fol. 454-544] Q. You didn't?

A. I found out about that during the meeting.

Q. You didn't know about the pending proceedings to which Tennessee Natural Gas Company and El Paso Natural Gas Company were a party before the Federal Power Commission respecting the sale of gas in California?

A. I had no personal knowledge of it. I had no connection with it.

Q. You never heard of that. Well, at any rate, at the meeting you learned that that was true?

A. That what was true?

Q. You learned it was true that there was such a controversy?

A. Yes, sir.

Q. And you learned that the Tennessee Natural Gas Company had collected this information in connection with that controversy with El Paso?

A. They didn't explain why they had collected the information. Their operators in the field.

Q. I see. And you didn't ask them how they came to collect this information?

A. No, I didn't ask that question, Mr. Harrison.

Q. You assumed it was just accidental that they had?

A. I made no such assumption.

Q. You didn't ask any questions about why they had this material concerning El Paso's holdings in the San Juan Basin?

[fol. 454-545] A. No, sir, I don't recall making that specific question.

Q. And nobody in Tennessee Natural Gas mentioned it?

The Court: I think he said—I think he's testified that he found out that there was that controversy before the Power Commission between Tennessee and El Paso, at that meeting. So somebody must have talked about it.

By Mr. Harrison:

Q. That's correct, is it?

A. I don't—I want to be open with you, but I'm not sure what you're referring to as being correct, Mr. Harrison.

Q. Well, we'll pass that for a moment. Now, when did you visit the El Paso Natural Gas Company?

A. It was the following week. If I may refer to my notes, once again. On November 24—that was the Tuesday following the Wednesday that we had visited with the—in Houston with the El Paso Natural Gas—excuse me. With the Tennessee Gas Transmission Company.

[fol. 454-546] Q. And that is the conversation which you testified on your direct examination concerning the exhibit, whatever it is?

The Clerk: Nineteen.

By Mr. Harrison (Continuing):

Q. —19. That is the same conversation?

A. Yes, sir, that is the same conversation.

Q. And they were very open with you, you said, the El Paso people?

A. They only—they were open in every respect except one. I think we made only one request for information that they didn't comply with.

Q. What was that?

A. That was to provide us with a copy of this so-called factoring curve that they had used in some of their reserve studies.

Q. I see. Would you have used that in your study had you obtained it?

A. I would have—yes, I would have used it.

Q. For what purpose?

A. To test in my mind the validity of the use of such a factoring curve.

Q. But you weren't using that kind of a curve, were you?

A. I did not use that curve.

Q. No, and you didn't intend to?

A. I didn't know about such a curve until I talked to them.

[fol. 454-547] Q. But you didn't intend to use it? You didn't intend to use such a curve in the course of your own independent study that you have described?

A. Well, Mr. Harrison, an engineering study is only concluded when your time runs out, and I can't say that I would not have used that curve in my study. My study wasn't completed.

Q. You just don't know? You can't answer the question?

Mr. Lipson: I believe the witness has already answered.

Mr. Harrison: He has not. I have asked the question whether he would use it or not, and he has stoutly refused to answer my question.

The Witness: I am confused now precisely what the question is.

Mr. Lipson: I believe the witness' answer is on the record. He has testified to it as far as he is capable of doing so.

The Court: Well, I don't believe he has answered the question: Did you intend to use that in your study? And I don't believe he has answered.

You are talking about the factoring method. Did he intend to use the factoring method in his study? I don't think he has answered that question.

The Witness: If I may be permitted to explain, your Honor, I had never heard of such a method until I talked [fol. 454-548] to these people.

The Court: I understand. You said that awhile ago. Just answer Mr. Harrison's question.

A. At the time that I asked for it, I was simply—I had no intention formulated one way or another in my mind. Had I received it—since I didn't receive it, I don't know if I would have used it or not, since I didn't receive it.

By Mr. Harrison:

Q. All right. Other than that they were pretty open with you, weren't they?

A. Yes, they were open.

Q. They kind of gave you about everything you wanted, didn't they?

A. Well, to the extent that I could copy it down by hand, the answer is yes.

The Court: He said they gave him everything except this one item.

By Mr. Harrison:

Q. Did you tell anybody at that meeting about your prior activities with the Tennessee Natural Gas Company?

The Court: Read the question, Miss Hallam.

(Question read.)

A. No, to my recollection I didn't. The question didn't come up.

By Mr. Harrison:

Q. You didn't tell them that you had obtained already basic well data from them?

[fol. 454-549] A. No, I did not tell them that.

Q. Or production figures?

A. No, I did not tell them.

Q. Now, the first step, as I understand it, in going about this independent study of yours, is to find the lands and properties which are the subject of your study, is that right?

A. Yes. That is quite basic to the study, to find what you are studying.

Q. Did you get those from the El Paso Natural Gas Company?

A. They gave us such a list at this—

Q. Did you use it?

A. We used it to the extent that we—as I had testified earlier—to verify the lists that we had already obtained through our client.

Q. Then you obtained from the Tennessee Natural Gas Company a list of the properties of El Paso which were supposed to be the former Pacific Northwest Pipeline's property?

A. Yes. They told us that they had received such a list through the work papers of El Paso Natural Gas.

Q. So you obtained that from Tennessee?

A. That is correct.

Q. Now, you didn't use all of the properties that were reported to you by El Paso, did you, in your study? You left some of them out, didn't you? You just used the Tennessee properties?

A. To the best of my ability, I used all the properties, sir.

[fol. 454-550] Mr. Harrison: May I ask the clerk to mark for identification a document entitled, "Summary of Results."

(Defendants' Exhibit N was thereupon marked for identification.)

By Mr. Harrison:

Q. I show you the document which is marked Defendants' Exhibit N. This contains a list of the properties which were the subject of your independent study, wasn't it?

A. There are several tabulations in this file.

Q. Will you answer the question as to whether they do or do not contain—

A. I just want to be sure what the question is. To this top sheet or to all of them?

Mr. Harrison: Will you please read the question.

(Question read.)

Mr. Lipson: Your Honor, the question is ambiguous insofar as the use of the word "document." It may refer only to the top sheet or the entire file. I think that is the witness' problem.

The Court: This is an exhibit. It bears a number for identification. I suppose that is what Mr. Harrison is talking about.

Mr. Harrison: That is correct, your Honor. I am just asking the witness to state whether this lists the properties which were the subject of his independent investigation.

[fol. 454-551] A. The first two tables that you read the the title of is a listing of properties, and those are the ones that were the subject of our investigation, yes, sir.

By Mr. Harrison:

Q. All right. Now, will you turn, please, Mr. Riggs, to Page 2 of this document, and I will indicate to you a list of two, four, six, seven properties under a heading, "These

Properties Listed by El Paso Natural Gas Only." What are those properties?

A. As I recall, earlier, Mr. Harrison, I had indicated that at the time we got the El Paso listing that there was a comparison made between it and the one that we had already used. Now—

Mr. Harrison: May I ask the witness—

The Witness: I am trying to get to the answer.

Mr. Harrison: I asked him a very simple question. I asked him a very simple question. He is making a speech.

Mr. Lipson: Your Honor, a simple question may even require a full answer.

The Court: Well, let's hear the question.

(Question read.)

By Mr. Harrison:

Q. Are they properties that were the subject of your study or not?

A. I have forgotten how far I got in the answer. Could we continue—

[fol. 454-552] The Court: Never mind. Now he is asking another question. Did you hear that?

Read it, Miss Hallam. Read it.

(Question read.)

The Witness: Would you like me to continue?

The Court: Just answer that question. I think that is a simple question. Do you want it read to you again? Read it, Miss Hallam.

The Witness: I think I understand what was read to me, and, if I may give you my understanding of the question, it is whether or not these particular properties that you pointed out here were included in my reserve estimate.

By Mr. Harrison:

Q. In your study, whatever you want to call it.

The Court: Did you include them in your study, is what he is asking.

A. No. These properties were not in the tabulation that I used initially.

By Mr. Harrison:

Q. So they were excluded from your study?

A. Yes, they were excluded from the study.

Q. Now, the El Paso Natural Gas Company told you that these were properties of Pacific Northwest, did they not?

A. They told us that they were developed properties—excuse me—El Paso told us by their listing that these were properties of Pacific Northwest. They also indicated that [fol. 454-553] these were a change they had recently made, so I suppose—

Q. You mean between the time you saw Tennessee and the time you saw them, you mean?

A. I understood these were some changes—these were some properties that they had subsequently found to be added to their listing of the proposed return to the New Company, and apparently they were not listed at the time that they made their filings with their work papers before the Federal Power Commission.

Q. What you are really saying is that they told you they were part of the properties that were going to the Pacific Northwest, didn't they, and they are producing properties, aren't they?

A. They didn't designate whether they were or were not producing properties.

Q. Are they or are they not, do you know?

A. I don't know.

Q. So you never investigated these properties at all?

A. No.

The Court: He has already answered that they were not included in his study.

The Witness: But they are not significant.

Mr. Harrison: What was that last statement?

The Reporter: (Reading) "But they are not significant." [fol. 454-554] Mr. Harrison: If your Honor please, I am entitled to pursue that further, am I not?

By Mr. Harrison:

Q. You have never investigated them, but they are not significant, is that right?

A. By El Paso's estimates of the reserve assigned to them, they are not significant to the whole study, was my intention to say.

Q. The fact of the matter is that what happened was that you got from the Tennessee Natural Gas Company a list of the properties of El Paso assigned to Pacific Northwest, and your study had already gone beyond a point where you could use any of El Paso's material, isn't that true?

A. It was more a question of the time that remained instead—

Q. Is it true? Is it true?

A. No. I used the studies of El Paso in my study. In fact, I have looked at them quite critically.

Q. I see. Now, when did you do your IBM runs on the data which you received from Tennessee Natural Gas Company?

A. We did several IBM runs just about up to the last day, but I rather imagine you are referring to the plotting of the pressures, is that correct, Mr. Harrison?

Q. Yes, that is right. That was all done before you ever saw El Paso, wasn't it?

A. Yes, it was.

Q. And you used, in that work, the properties that were [fol. 454-555] given to you as the properties of Pacific Northwest by Tennessee and not those given to you by El Paso?

A. Yes, that is correct.

Q. Now, as a matter of fact, you took the records of Tennessee Natural Gas Company—you use certain cards which relate to the information respecting various wells in the course of your study, do you not, and you translate the information from those cards to your IBM machines, is that correct?

A. That's correct.

Q. And as a result of that, you get, upon separate charts, designations indicating the pressure statistics and the production of each well from time to time, is that right?

A. That's correct.

Q. And then, with the use of that material, chart by chart, you, as an expert engineer, draw an extrapolation, and it is that extrapolation on each of those individual charts that is the exercise of your skill, is that not right?

A. Yes, I suppose you could state it that way.

Q. Well, I could go out and collect the well information, couldn't I?

A. Yes. It is available to the public.

Q. I could do everything up to that point, couldn't I?

A. Yes, sir.

Q. If I could run an IBM machine. So the point where [fol. 454-556] your skill comes in, well by well, is in the exercise of your professional skill in extrapolating the information contained on each individual chart?

A. Yes.

Q. I show you a document entitled, "Job No. 3837," November 21, 1964. I will ask you to describe in general the information which that shows.

A. This is what we normally term a print-out from our IBM 1401 digital computer. This particular tabulation has a number of headings across the top, but basically this is an average method by which, by township—state, township, section, and range—we determined an average pressure and a cumulative production average for that particular group in that period of time.

Q. Now, once having accumulated that information in that form, what is your next step?

A. My next step with this was, after looking at it, to set it aside.

Q. In other words, you made no further use of that information after it had been accumulated?

A. That is correct.

Q. And this did not go into your IBM calculations which fixed the well information upon your chart?

A. No, it did not. That was one of the dead ends we run into.

Q. So this material doesn't enter into your study at all?

[fol. 454-557] A. It didn't enter into our final conclusions.

Q. Now, I show you another document, "Tennessee Gas Transmission Company Code Sheet, San Juan Basin Statistical Study Lease or Unit Card." I will ask you whether you used that type of document in the course of your study?

A. Yes. This is the form in which we received the basic individual well production and pressure history.

Q. Well by well?

A. Well by well.

Q. And is that the information that you put through your IBM machine in order to position the information necessary on your chart of extrapolation?

A. Yes, that is correct.

Q. When did you receive this information of the character shown on the chart?

A. I received it on the date of our visit to the Tennessee Gas people.

Q. That was—I have forgotten the—

A. I have, too, Mr. Harrison. Let me look back.

Q. I think it is the 19th.

A. That was the 18th of November.

Q. When did you start running this information through the machines for the purpose of preparing your chart?

A. Just as quickly as we got back to Dallas, which would —my recollection would be—would be on the 19th of No-

[fol. 454-558] vember, 1964.

Q. And when did you complete it?

A. Complete what particular phase, Mr. Harrison?

Q. Complete the translation of the information, well by well, given to you by Tennessee Gas Transmission Company?

A. Well, I will have to rely on memory here, but my recollection is that the key punching of all of this material carried on into, oh, sometime over the weekend, perhaps the 21st.

Q. So that this job was completed around the 22nd?

A. Translating that information onto IBM key punch cards.

Q. Yes. Now, after you put this information upon the—into the IBM machine, I ask you whether that resulted in reproducing on a chart such as you have before you certain information?

A. Eventually, yes.

Q. What information was that?

A. This is the plot to which I had reference of shut-in well-head pressure plotted against cumulative gas production by individual wells.

Mr. Harrison: And I will ask that this be marked for identification.

(Defendants' Exhibit O was thereupon marked for identification.)

Q. Now, then, after this information had been translated to just such charts as this for all of the cards given you by [fol. 454-559] Tennessee Company, your next step was to perform the operation of extrapolation, is that right?

A. That's correct.

Q. Well, showing you Defendants' Exhibit O, will you explain to the Court how you extrapolated that particular chart, so that we will know how you did it. This is the exercise of your particular expertise, is it now?

A. Yes, sir. I don't think I have had it expressed that way before, but that would be it. If you will notice, there are two plots on this, one that was printed by our IBM machine and one that was done in pencil. Now, our staff, in making the extrapolation, sometime found it that the

particular scale that had been selected was not—didn't present itself to an easy reading of the values, and when that occurred, by hand they replotted to a different scale, and in the particular one that you have shown me the machine plot was for a gas limit of zero to 600,000 mcf, which would have made the extrapolation run off the page; so, for convenience, these were replotted by hand to a scale of zero to 600,000—excuse me—the machine plot was zero to 300,000, and this was a plot zero to 600,000, which they replotted in red upon this. Then, simply looking to the pressures involved, an attempt is made to draw what is the best straight line through these points, and that is what we have done here.

[fol. 454-560] Q. In other words, this is where you undertook to use your judgment in determining what the reserves of that particular well would be; is that correct?

A. Yes, myself and in our staff.

Q. I see.

A. Which was working with this project.

Q. I see. Now, did you discover in that case, for example, by accident perhaps that the result of your extrapolation was identical with that of Tennessee Natural Gas, even to the fourth point?

A. I'd like to phrase my answer this way, if I will, because I—I think I see the point, and I thought I had already made that clear—

The Court: Well, now, that's a very simple question. Did you make that observation?

The Witness: The extrapolation, Mr. Harrison, was made to see if the reserve that we had already seen was a reasonable value. In some cases it was, and it would have been to the exact point, and in some cases it was not.

By Mr. Harrison:

Q. Well then, may I ask you if this was the procedure you followed: You took all of the information that Tennessee Natural Gas gave you. You proceeded to put it

through your processing methods. You came out with a chart showing the well information. And then you looked at Tennessee Natural Gas's extrapolation to see if you could agree with it?

[fol. 454-561] A. Yes. Basically that's what we did.

Q. So that the result is you came out with perhaps 75 per cent of all of your well pressure estimates identical with Tennessee Natural Gas to the fourth point; is that right?

A. You have my work papers that give this comparison.

Q. Well, give us your estimate.

A. My estimate, when we got through, to see how valid this study was—and this is what we were interested in—to see the validity of El Paso's and Tennessee's study—was within about five or six per cent. I could give you the numbers if I had access to my work papers.

Mr. Harrison: Would you mind reading the question back to the witness?

(Question read.)

By Mr. Harrison:

Q. I'll try again. Isn't it true, Mr. Riggs, that what you did was to process the Tennessee Natural Gas information respecting developed wells through your machinery and processors up to the point where you had a chart ready for each well for extrapolation? You then took Tennessee's extrapolations, or figures which reflected extrapolations, and accepted them unless you felt that there was some reason to differ, and that you came up with 75 per cent of them identical?

The Court: To the fourth point.

By Mr. Harrison:

Q. To the fourth point.

[fol. 454-562] A. I don't know about the per cent. I do know that substantially the values that we found through

this procedure were within—in the aggregate within about five or six per cent of the numbers that Tennessee had.

Q. And in each instance you looked first at Tennessee's figures to see whether you could approve it; and then you extrapolated if you approved it, to accord with Tennessee's figures. Isn't that right?

A. Yes. We looked to see if this was a valid number.

Q. Yes.

A. From this basic information.

Q. And once you felt Tennessee's was a valid number, you simply drew your line accordingly on your extrapolation?

A. Yes.

Q. Now, let us turn momentarily to Colorado, if you will. You had said, of course, on your direct that you obtained the information from a commission. Where did you obtain your information with respect to well pressures and production of wells in Colorado?

A. I'd like to correct your statement, Mr. Harrison. I didn't obtain these from the commission. I said they came from the commission, which I understood—

Q. Where did you obtain your well pressure and well production figures in Colorado?

A. From the same source. From Tennessee.

[fol. 454-563] Q. Tennessee Natural Gas. And did they tell you that they got them from any public body?

A. No, they told me they got these from the work papers of El Paso.

Q. And did you check the work papers of El Paso to see if they had correctly reflected what El Paso gave them?

A. No.

Q. You just took Tennessee's word for it?

A. Yes. I used the figures they used.

Q. You just took Tennessee's word for it?

A. Yes.

Mr. Lipson: The witness answered the question, your Honor.

Mr. Harrison: If you'll say he answered it "yes," that will satisfy me, counsel.

Mr. Lipson: The witness has answered the question, and his answer appears on the record.

Mr. Harrison: It was "yes."

By Mr. Harrison:

Q. Now, when did you employ these figures? Which of the two pressures did you use with reference to determining gas well reserve estimates? Casing or tubing?

A. At which time, sir?

Q. Well, I don't know at which time. At any time.

A. I used the ones that were available.

Q. Do you mean you used some in one case and others in another?

[fol. 454-564] A. I know the point you're getting to, and I'd like to—

Q. Well, I'd like an answer to the question.

A. I'd like to make an answer.

Q. I'm not trying to get to any point. I'm just asking the question.

A. I could clear this up, your Honor, with an explanation.

The Court: Well, what you'd better do is just answer counsel's questions. If there's anything to be cleared up, your counsel will look after it.

A. We used the higher of the two when there was a choice.

By Mr. Harrison:

Q. And in what group of cases, what instances were—by the way, which is the higher of the two?

A. It varies.

Q. Well, is there any experience in the San Juan Basin in this respect that you know of?

A. I have reviewed a tabulation, and the composite difference was about two per cent between the two.

Q. Throughout the San Juan Basin?

A. In 1963, within the New Company properties. Excuse me, sir, I'd like to correct that. I think that particular tabulation was within the whole San Juan Basin.

Q. What basin?

A. My recollection is, this particular tabulation that I reviewed was through the whole San Juan Basin, in the year 1963.

[fol. 454-565] Q. What was that you reviewed?

A. This tabulation of the comparison between the pressure as reflected on the casing and the tubing.

Q. Well, where did you get this tabulation?

A. I got this from Tennessee.

Q. From Tennessee?

The Court: It seems to me we got everything from Tennessee.

By Mr. Harrison:

Q. Can you tell me, did you make any investigation in your study of the extent to which Tennessee used one or the other method, to wit, the casing of the tubing, as the basis for pressure?

A. No.

Q. Did you ask Tennessee if they had any information on that subject?

A. Yes. They gave me this tabulation.

Q. By the way, do you have that tabulation with you?

A. No, sir, it's in the work papers.

Q. It's here, is it?

A. That's correct.

Q. Perhaps you'll assist us in finding that at the intermission.

A. I can do it right now if you'd like.

Q. Now, let's turn to undeveloped properties for a moment. Did you obtain any information from your friends on that with respect to the undeveloped properties of Pacific Northwest?

[fol. 454-566] A. Which friends do you have in mind, sir?

Q. The Tennessee Natural Gas Company.

A. Yes. They gave us a compilation of their estimates and the undeveloped reserves.

Q. Now, as a matter of fact, Mr. Riggs, when you undertook to evaluate the undeveloped acreage, you accepted the figures of Tennessee in every single instance, did you not?

A. I looked at these figures, but I did not rely upon these figures.

Q. I have a document marked, "Allocation of Production, Mesa Verde," in a folder entitled, "GPP Revised-Flora Vista-Mesa Verde-GPP Est of PNW." I'd like to have that marked for identification.

(Defendants' Exhibit P was thereupon marked for identification.)

By Mr. Harrison:

Q. I show you Defendants' Exhibit P for identification, Mr. Riggs, and ask you if that contains information furnished you by Tennessee Natural Gas Company respecting reserves in undeveloped acreage of Pacific Northwest property of El Paso.

A. Yes.

Q. Now, I'll ask you if it isn't a fact that in every instance the reserves which you attributed to the unproductive acreage consisted of applying a factor of 1.2 times the result obtained by Tennessee Natural Gas for the same area.

[fol. 454-567] A. No.

Q. Did you use those figures at all?

A. Yes. We used these figures.

Q. And to what extent?

A. We posted to a map that's in our work papers—

Mr. Harrison: I ask the identification of a map entitled, "Mesa Verde Reservoir, San Juan Basin."

(Defendants' Exhibit Q was thereupon marked for identification.)

By Mr. Harrison:

Q. Is this the map to which you refer, Mr. Riggs?

A. Yes, this is the map, Mr. Harrison.

Q. All right. Now, will you point out where the undeveloped acreage is on that map?

A. We have—may I approach the map?

The Court: Surely.

By Mr. Harrison:

Q. Will you point out the undeveloped acreage, please?

A. This is a map of all of the Mesa Verde wells in the San Juan Basin. The other wells are not on it. The acreage shown in yellow is to the best of our ability to transcribe this list, the undeveloped acreage of the Pacific Northwest.

Q. Now, this exhibit I showed you before—

The Court: It's ambiguous to refer to this as Pacific Northwest, isn't it, Mr. Lipson?

[fol. 454-568] Mr. Lipson: It's difficult to say just what it would be, your Honor. Perhaps the reserves assigned to New Company might be clearer for the purposes of this procedure.

The Court: Well, it certainly would. I wish you'd refer to it that way.

The Witness: All right, sir.

The Court: There isn't any Pacific Northwest. No such organization.

By Mr. Harrison:

Q. Now, can you take Exhibit P and can you identify the reserves for the undeveloped acreage as shown upon the study? In other words, can you identify it upon the map? These figures on the map are the undeveloped acreage—indicate your appraisal of these various undeveloped acreages, do they not?

A. Yes, sir, they do.

Q. Well, can you identify how they compare with the manner in which they were appraised or evaluated by the other company?

The Court: What other company?

Mr. Harrison: That name slips me all the time.

The Court: Tennessee?

By Mr. Harrison:

Q. Tennessee. Can you apply the Tennessee figures to the undeveloped acreage? Can you identify them?

A. Yes.

Q. Are you able to do that?

A. Yes. This is what we have—

[fol. 454-569] Q. All right. Well, will you take the first one that you find there, and will you—

A. Unfortunately, the first one that we find has none.

Q. Well, the second one.

A. So we'll turn to the second one.

Q. Yes.

A. The second one is in Colorado in Township 32, Range 7. Here is Range 7 West (indicating), Township 3 North. And let's see, it's in the south half of Section 17. The sections aren't numbered on this, but there's a normal system of finding that, which starts up in the upper right-hand corner. So I'll have to count.

Well, by my count there, I'm embarrassed to say that I don't find that colored yellow. So we must have slipped there.

Q. Well, try another one. Try the next one of Tennessee's, if you can find that.

A. This map isn't too clear. Let's see, I can tell you at that point, I have nothing colored in yellow in Township 32 South. So this particular map has no undeveloped shown in yellow.

Q. So you can't apply the Tennessee—

A. Not on this particular sheet.

Q. That particular sheet shows a reserve that you don't show? Is that right?

[fol. 454-570] A. I have to look back to my papers.

Q. Just a minute. Maybe we have a tabulation that will help you.

A. One of the exhibits that we've already put in evidence, I believe, is a tabulation. The coloring of the map had nothing to do with our reserve estimates. This was just to help us identify the properties.

Q. Well, have you any way of identifying the evaluations of Tennessee as compared with your evaluations in any particular part of the undeveloped area?

A. Yes.

Q. All right. Will you try and show us how you do it?

A. Excuse me. What we have done, Mr. Harrison—and I think—I had hoped I had made it clear before now.

Q. No, you haven't.

A. What we had done was to—you see, this is, as you can readily see, this is the edge of the—

Q. Yes. I see that.

A. And if you look closer you can see that the wells get poorer as they move out—

Q. Yes, I see.

A. Now, what we had done was write beside the well there where there was a developed well, beside the well our reserve estimate that we have already gone through the procedure on. And then we looked at the offset well to see if the number was a reasonable extrapolation by [fol. 454-571] the control afforded by the—

Q. I want to see what the comparison is between the reserves that you assigned to the wells and the undeveloped acreage and those assigned by Tennessee. Can you tell us that?

A. Yes.

Q. All right. Will you proceed to do that?

A. They're essentially identical.

Mr. Harrison: Essentially identical. That's all I wanted.

Q. By the way, did you make any examination or study of the other properties of El Paso Natural Gas Company?

Mr. Lipson: Your Honor, the question isn't clear. Other than what?

Mr. Harrison: Other than what he has just described in his testimony.

A. No.

By Mr. Harrison:

Q. Well, you consider that you're in a position to state in here at this time a dependable estimate of the total reserves of El Paso Natural Gas Company in the San Juan Basin?

Mr. Lipson: Your Honor, this question was never put to the witness. He was not put on the stand on any theory of that nature. His testimony was exclusively with respect to the Mesa Verde. His study was directed to the Mesa Verde.

The Court: Your inquiry is broader than—

[fol. 454-572] Mr. Harrison: Very well, your Honor.

By Mr. Harrison:

Q. Have you ever made any study of the reserves of the New Company in any other formation than the Mesa Verde?

Mr. Lipson: Your Honor, this goes beyond the scope of voir dire.

Mr. Harrison: Well, this 73 per cent was put on through the witness.

The Court: I think we're getting over to the area of cross examination of this witness.

Mr. Harrison: Very well, your Honor. I at this time object to the admission of the exhibit which has been tendered, upon the ground that it's not the study of this witness, that it is based entirely upon information obtained by hearsay and from third parties, in this particular case the third party holding an acknowledged adverse interest in other proceedings to the El Paso Natural Gas Company; that none of the information of any substance furnished by El Paso was ever used by this witness in his

study. It is not this witness's study at all. As a matter of fact, Tennessee Natural Gas Company's study. And if they wish to come here and testify to this study, we'll be glad to meet them here.

Mr. Lipson: Your Honor, I think that may be an unfortunate characterization of the study. The basic question about the study, if I understand counsel correctly, is that [fol. 454-573] the underlying figures, the tabulations derived from the state commissions, were supplied to the witness by Tennessee.

The Court: They weren't supplied by the State Commission. They were supplied by Tennessee.

Mr. Harrison: I wish to correct counsel, if I have not made my objection clear. I object upon the further ground that the results and the inferences were all identical to Tennessee's and are Tennessee's study and Tennessee's inferences and conclusions.

Mr. Lipson: Your Honor, the interesting fact is, of course, this underlying data has been available for some time now in counsel's hands for his experts to go over. Yet, in the course of voir dire, no question was even asked about the accuracy of the figures contained in these underlying data; and I think that that is the most significant omission in the voir dire examination of the witness. The underlying figures themselves have not been questioned, your Honor; and since those are the basis—

The Court: Well, now, that's a very serious question, it seems to me. Here, the Tennessee Gas Company is in a red hot contest before the Federal Power Commission with El Paso Natural Gas Company. Red hot. And I was advised in chambers—and it's on the record—we took the reporter in with us—Tennessee claims before the Federal Power Commission that El Paso doesn't have the reserves that El Paso told the Power Commission they had when [fol. 454-574] they were certificated to serve California. [fol. 454-575] Now, that is a grave, adversary contest, and Tennessee is a party to that.

Now, it seems to me that the reliability of Tennessee's figures is seriously in question here, and the witness has testified that he didn't make an independent study at all. Everything he did, every bit of information he used, came from Tennessee.

Now, Tennessee isn't here. Tennessee isn't under oath. Tennessee isn't subject to cross-examination. And, worse still, when the witness first went on the stand, as Mr. Harrison has pointed out from the record this morning, this witness didn't say anything about Tennessee. He said it was his study, and his associates' study. When he has been talking about sources of information, he didn't mention Tennessee.

Now, this is a grave question, it seems to me, whether an expert in this situation, so-called expert, can come here —he was put up to this in the first place by the Oregon Public Service Commission.

I suppose it is well known in the industry—I have never heard of it, of course—it is well known in the industry that this controversy is going on before the FPC between Tennessee and El Paso. I guess the Oregon boys knew about it. They get in touch with these people down in Dallas, and they don't make any studies. They just go over [fol. 454-576] to this adversary in the FPC proceeding and take over his position and put it in here.

Now, if you want to get those Tennessee experts in here, those witnesses who prepared that data and made those investigations, well and good, but I don't think you can have a man go down there and adopt, lock, stock, and barrel, the Tennessee work, and then come up here and attempt to work it off on this Court as his own. That is what it looks to me like is taking place.

Mr. Lipson: Your Honor, with all respects, it is not my understanding from Mr. Riggs' testimony that he has adopted the Tennessee study. He used the basic tabulations that Tennessee derived from the State Commissions, as I understand it.

The Court: Well, his extrapolations are identical to Tennessee. Now, this is something that doesn't happen. It just doesn't happen in an area where there is the uncertainty—this is largely a matter of estimate, and, as the witness said this morning, the divergencies, which he said were serious, between his determinations and El Paso's in the undeveloped, undrilled areas, in areas where you couldn't expect to make any very accurate determination—but here his lines correspond identically with Tennessee's. Now, that just doesn't happen. That is contrary to all common experience in this matter.

[fol. 454-577] Mr. Lipson: In all respect, your Honor, I believe the witness would testify to a five to six per cent differential in his findings and Tennessee's findings.

The Court: There is a lot of testimony, and I have listened to all of it very attentively, after I was alerted to it in chambers, as to what the problem was.

Well, we will take a recess. We will come back at two o'clock and I will rule then.

(Whereupon a recess was taken until 2:00 p.m. of the same day.)

[fol. 454-578]

AFTERNOON SESSION

2:00 p.m.

The Court: All right, Mr. Lipson.

Mr. Lipson: May it please the Court, as a result of the testimony that has been brought out, we think there is sufficient doubt about the independence of the study and of the underlying data used to support the study in order to offer it as a conclusion of this witness, and therefore the Government withdraws its offer of Government's Exhibit 19, and moves to strike this witness' testimony.

MOTION GRANTED FOR GOVERNMENT TO WITHDRAW GOVERNMENT EXHIBIT 19 AND TO STRIKE TESTIMONY OF RAY B. RIGGS, JR.

The Court: The motion is granted. The testimony is stricken.

Mr. Lipson: Thank you, your Honor.

Mr. Harrison: Does the Government rest?

Mr. Lipson: Your Honor, the Government has no further witnesses to offer at this time.

The Court: I don't know what that means. What does "at this time" mean? Do you rest or do you expect to have some further witnesses, or what is the situation?

GOVERNMENT RESTS

Mr. Lipson: We rest now, your Honor, unless your Honor wishes to hear witnesses about those third-party matters at some other time.

The Court: Oh, yes.

Mr. Lipson: That is what I was referring to.

The Court: When I say "Oh, yes," I don't mean I wish [fol. 454-579] to hear the testimony. I am reminded that we have that matter in abeyance. And, also, as we proceed along the lines that I have already outlined to you, maybe we will take some more testimony, you know, on the various areas that we are going to investigate together and at some length and in depth.

All right, Mr. Harrison.

Mr. Harrison: I have a witness.

The Court: And I am not going to preclude you from offering anything you want to, you know, along the way.

Mr. Lipson: Thank you, your Honor.

A. M. DERRICK, JR. called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Harrison:

Q. Will you state your name and address, Mr. Derrick.

A. A. M. Derrick, Jr., Post Office Box 1492, El Paso, Texas.

Q. And what is your occupation?

A. I am manager of the Reservoir Engineering Department of the El Paso Natural Gas Company.

Q. How long have you been employed by that company?

A. Since April, 1953.

Q. State in general terms your educational background.

A. I received a Bachelor of Science degree in petroleum [fol. 454-580] engineering from the University of Texas, and a Master of Science degree in petroleum engineering from the University of Houston.

Q. What was your experience before you became employed by El Paso?

A. After serving as an engineering officer in the United States Navy during World War II, I joined Stanolind Oil and Gas Company, which is now Pan American Petroleum Company, and did various field and office engineering duties. And I worked in Pampa, Texas and Wink, Texas field offices, and I worked in the Reservoir Engineering Department in Tulsa, Oklahoma, and Midland, Texas.

At the time I left Stanolind I was in charge of the Reservoir Engineering Department in their West Texas district office in Midland.

Q. What has been the nature of your work with El Paso?

A. I have been involved in reservoir engineering work exclusively.

Q. Will you describe the responsibilities of that position?

A. Yes. All the company's gas reserves and gas availability studies are under my supervision.

Q. Are you a member of any professional engineering associations?

A. Yes, sir. I am a member of the Society of Petroleum Engineers and AIME, and the American Association of [fol. 454-581] Petroleum Geologists and the Society of Petroleum Evaluation Engineers. I am also a registered professional engineer, and a member of the Texas and National Societies of Professional Engineers.

Q. I show you an exhibit, Plaintiff's Exhibit No. 16 in evidence, and ask you to look at it. Will you observe there certain entries by Mr. Hess, who sponsored that exhibit, with respect to 1963.

A. Yes, sir. Those are as of December 31, 1963.

Q. And what does the exhibit show in that respect?

A. It shows the per cent of the San Juan reserves for New Company being 17.01 per cent and for El Paso Natural Gas Company being 82.99 per cent.

Q. And do you accept those figures as being correct?

A. Yes, sir, I do.

Q. Now, using that figure for 1963, are you able to testify to what the reserves, percentage of reserves, owned by Pacific Northwest were on December 31, 1959?

A. Yes. The method I would get that would be to start with the end of the year 1963 reserves, which we feel are the best estimates available, and then work backwards by applying the production and the acquisitions and back up to January 1, 1960, or December 31, 1959; and those percentages at that time would be 21.3 per cent for New Company and the remainder would be for El Paso. It would be 82.7 per cent—excuse me—78.7.

[fol. 454-582] The Court: That is what they had at the time of the merger?

The Witness: Yes, sir.

By Mr. Harrison:

Q. And that is done simply by taking—computing what has been taken from the field in that period of time?

A. Yes, sir.

Q. And adding the additional reserves that have been acquired?

A. Yes, sir.

Mr. Harrison: I am not going to introduce the exhibit. I have no further questions.

Mr. Lipson: No questions, your Honor.

[fol. 454-583] COLLOQUY

The Court: Well now, while I'm on this, will you tell me, Mr. Harrison—we've just now received the percentage of the San Juan reserves that Pacific Northwest had before the merger.

Mr. Harrison: Yes, your Honor.

The Court: Now, what you propose in your plan is to give them what?

Mr. Harrison: We propose to give them in our plan the reserves that we acquired from them in San Juan, if your Honor please, and no more, whether that be 17 percent or more or less.

The Court: In other words, give them just what you got from them?

Mr. Harrison: That's exactly it. Less what has been withdrawn in the meantime, just as our reserves have been withdrawn from us. We do not propose to give them any reserves in San Juan subsequently acquired with the funds of El Paso.

The Court: Well, now, let me see if I understand this. You say less what's been withdrawn—

Mr. Harrison: Well, I mean during the period of the merger we have been supplying the Northwest and Southwest and California markets from San Juan. Obviously to the extent that there are withdrawals the reserves have to that extent been depleted. So we don't have them to give. They've been used in the public service.

[fol. 454-584] The Court: They've been used in El Paso service, too.

Mr. Harrison: Well, San Juan reserves of El Paso have been diminished to that extent, and so have reserves of the New Company.

The Court: All right. Now, what's your position about this, Mr. Lipson?

Mr. Harrison: Shall I retain the witness?

The Court: Let him stay there. We may need him.

Mr. Lipson: In general our position on this matter is described in our brief in the section that deals with the—

The Court: I know. I wanted you to tell me about it.

Mr. Lipson: That deals with the gas allocations. And I would be pleased to inform your Honor of our position in general; but at the moment I don't have the numbers at my fingertips, and I'd like to have an opportunity to review the numbers.

The Court: Oh, well, then, I won't call on you for it.

Mr. Harrison: We have no further evidence, your Honor.

The Court: And you have no further evidence?

Mr. Lipson: That's correct, your Honor.

The Court: All right. Now, have you completed your [fol. 454-585] argument with me concerning the spin-off feature of the El Paso plan?

Mr. Lipson: The Government has, your Honor.

Mr. Harrison: Yes, your Honor.

The Court: All right, then. We can move on to the next area; and maybe a good place to start would be the differences between you with respect to the matter we just discussed; namely, the El Paso plan proposal concerning the San Juan Basin. Would that be a good point?

Mr. Harrison: Yes, your Honor, that's satisfactory.

The Court: Or you can choose any area you want to.

Mr. Harrison: That's satisfactory to the defendant.

Mr. Lipson: Your Honor, before we commence in that area, the Government made some legal investigation of a related area to the spin-off that's not intimately connected with the spin-off and that deals with your Honor's power to effect changes in the security holders of the New Company; and we have prepared a legal memorandum, and we'd like to distribute it at this time, if your Honor please.

The Court: All right.

Who is the trustee you propose in your plan?

Mr. Harrison: We have not named a proposed trustee, if your Honor please. I do not know whether the Government has discussed the subject or not. However, we'd be glad to accept any recognized well established concern in that position. Be very glad to have the Government name [fol. 454-586] the trustee.

The Court: Well, I'm thinking about the Court naming the trustee.

Mr. Harrison: That's certainly satisfactory, your Honor. In any case, the Court would have to approve it.

The Court: I'm thinking about the Court naming the trustee, and I'm thinking about the Court retaining some jurisdiction to supervise what he does over a period of time.

That's the first suggestion I've made about this situation. This is something I've been thinking about. And we'll pursue that further later on.

Mr. Harrison: As far as the defendant is concerned, we stipulate that the Court appoint the trustee and reserve such jurisdiction over the trustee as the Court shall require.

Mr. Lipson: Your Honor, without conceding the point about whether or not a trustee should be appointed, if one were appointed it would be satisfactory to the Government that the Court make the appointment.

The Court: Well, of course, I'm not asking you to concede anything. But it might be helpful when we get to that point to bear in mind that the Court may appoint that trustee, and the Court may retain jurisdiction over the exercise of the voting powers that that trustee shall have, to the end that there be no violation of Section 7 of the Clayton Act.

[fol. 454-587] Of course, that's assuming at this juncture —and, of course, I don't ask you to make any concessions about that—that's assuming that we go ahead with some kind of a spin-off, and that's a long way ahead of us yet. We haven't arrived at that point yet.

All right.

ARGUMENT BY MR. HARRISON ON BEHALF OF EL PASO

Mr. Harrison: Shall I proceed on the issue of San Juan reserves, your Honor?

The first position that the defendant takes in respect to this matter, your Honor, is that the law is well settled that the purpose of a decree in this case is to restore the property that was acquired by reason of the violation of Section 7, and no more; that there is no precedent in any proceeding under Section 7 to require the acquiring company to contribute to a new enterprise property subsequently acquired by the acquiring company with its own capital and in pursuit of its own business.

We believe that to deprive the El Paso Natural Gas Company of properties which it did not acquire from Pacific Northwest and which it purchased with its own capital in the pursuit of its own business would be contrary to its constitutional rights; that it would be a preemption of property contrary to the Constitution and contrary to law. [fol. 454-588] Now, the United States Supreme Court has passed on this question. It passed on it in Schine Theaters v. United States in 334 U.S. 110. This was a motion picture case for a violation of the Sherman Act; and I wish the Court to note that it was a violation of the Sherman Act, and not merely a violation of Section 7 of the Clayton Act, which looks to future and not to past violations, and in contrast to a Section 7 case, which does not involve past restraint of trade, any past conspiracy, or any monopoly.

The District Court in the Schine case entered a decree divesting the defendant of a number of theaters. As the District Judge said in so doing:

"... so that the fair competition between defendants and other theaters may be restored and thereafter maintained."

In other words, the District Judge undertook to refashion the market, to create an area of competition which he considered satisfactory to him.

The trial judge made no findings, however, as to which of the theaters ordered to be divested were related to the antitrust violation. The Supreme Court held this to be error, pointing out that the defendant should have been divested only of theaters obtained by practices which violate the antitrust laws.

In reversing, the Court said it was entirely possible the [fol. 454-589] defendants had been divested of theaters legally acquired and permitted to retain theaters illegally acquired in course of the violation.

And I remind you again that this was a Sherman Act case, a Sherman Act case in which the principle prevails that you must disgorge all of the fruits of your illegal conduct.

No past illegal conduct is involved in this case. This is a Section 7 case. This case relates to vying for future segments of gas demand in markets of the future and markets to come. Perhaps it is as the Solicitor General said, even in the 70's and the 80's.

In this case, El Paso Natural Gas Company has acquired only certain reserves in the San Juan Basin from Pacific Northwest. They are identified. It had reserves of its own in the San Juan Basin which can be identified. It acquired certain additional reserves in the San Juan Basin with its own capital, in pursuit of its own business, and in support of its own market requirements.

So I say that the Schine Theater case fully substantiates the principle that it is beyond the power of the Court and contrary to the constitutional right to deprive El Paso of those properties subsequently acquired in the course of its business and not connected with its acquisition of Pacific Northwest.

[fol. 454-590] I refer also to Reynolds Metal Company v. Federal Trade Commission in the District of Columbia Circuit at 309 F.2d 223. This involved a Trade Commission order of divestiture against Reynolds for acquiring a foil company in violation of Section 7.

In addition to divesting such assets acquired from the foil company by Reynolds, the Commission ordered Reynolds also to divest a new plant constructed by Reynolds with its own funds in California after the acquisition or the use of the acquired business.

The Trade Commission also ordered divestiture of so much of any other assets and properties as it put into the business since the acquisition as may be necessary to retore it to its former competitive stand.

Reynolds contended on review before the Court of Appeals that this order to divest after-acquired property is violative of the antitrust law, and if not, amounted to an unconstitutional taking of Reynolds' property. The Court of Appeals reversed, without reaching the constitutional questions, as it stated itself, saying:

"Divestiture is an extremely harsh remedy and should be decided as to property obtained by such an acquisition only when necessary to the restoration of the competitive situation altered by the acquisition."

The Court agreed with Reynolds that there was no war-[fol. 454-591] rant in the antitrust law for divestiture of its own plant and said:

"If ever after-acquired property could be divested, it would be necessary for the Government to show in such a case that there was a nexus between the property acquired and the Section 7 violation and that the restoration of the competitive status quo required divestiture of after-acquired property."

Yet, El Paso has not limited its plan to assets acquired from Pacific Northwest.

We assert that we could properly have come before this Court and stood upon the legal proposition that we were obligated only to give to the New Company what it acquired from Pacific Northwest, and nothing more.

But the fact is that El Paso has not limited itself to such a proposal. It has gone far beyond what the law requires or dictates. In its purpose to create a New Company

which will be strong competitively, which can serve adequately the markets of the Northwest, and which is equipped with all of the features necessary to vie for other markets in the future, it has turned over reserves which it acquired since the acquisition of the stock in the merger. It has turned over the reserves in Big Piney, the Rocky Mountain area, and has turned over all of the Canadian reserves, reserving only a small preexisting sumas contract. It has turned over the Kingsgate gas. It has turned [fol. 454-592] over all of the access—I say it's turned over—proposes to turn over, may it please the Court—all of the access which it presently enjoys in the vast reserves of Canada or in the vast reserves said to lie under the areas of the Rocky Mountains. It has lost when it renders this every purpose for which El Paso acquired the stock and pursued the merger.

The Court will recall this testimony in the record uncontradicted that those purposes were first to acquire dry gas reserves of the San Juan Basin to balance the wet gas reserves of El Paso. It acquired principally, however, the stock in order to obtain this access to the reserves in Canada and to the Rocky Mountain area. It not only transfers after-acquired property, both in the Kingsgate and the Rocky Mountain area to the New Company, but it cuts itself off from all of the competitive advantages which it sought when it acquired the stock.

It is transferring or proposing to transfer to the New Company the investments and betterments and additions and extensions of the facilities of the New Company, exceeding $60 million in value. It turns over reserves in Canada at Kingsgate, in which it invested $3.5 million or thereabouts for the acquisition of the reserves. It turns over to the Opel gasoline plant in Wyoming, which was built after the merger and with the funds of El Paso Natural Gas Company.

[fol. 454-593] I suggest to the Court that apart from our legal right not to have gas reserves excised from those of El Paso, which it never acquired from Pacific Northwest; that any fair consideration of this question involves the total plan which El Paso proposes.

Unfortunately, El Paso in presenting its plan and in putting its best foot forward to create a truly competitive company, a truly valuable company, valuable because its stock must be valuable in El Paso's own interest, a truly competitive and vigorous company, because otherwise it could never have obtained the consents of security voters to the division of debt which has been arranged, it has gone far beyond any legal obligation; and yet, having made this proposal, with all of these assets involved, we are then confronted with complete ignoring of all that has been proposed by way of benefits to New Company and an attempt to get just a little more.

Now, this attempt to get just a little more in the San Juan Basin is not just a little more, so far as El Paso is concerned. The reserves necessary to support the surface contracts and commitments of El Paso to its Southwest and California markets renders it essential that these after-acquired properties, acquired for the purpose of supporting those commitments, be permitted to stand behind them. It was also in a large measure—and the Court will recall, because the Federal Power Commission had repeatedly [fol. 454-594] told El Paso, "You do not have adequate reserves," that it acquired the stock of Pacific Northwest. And so in attempting to secure additional reserves to support its markets, El Paso has only been doing what is its legal and public duty to do.

[fol. 454-595] And when we present this plan to the Court and to the Government, we show that the net result of the reserves, looking at them all, all of those which El Paso has given in the north, in Canada, and those which El Paso has bought to replenish its reserves and support its commitments in San Juan or elsewhere, both companies come out with 14 years of life deliverability.

I would think, if your Honor please, that what is good enough for El Paso ought to be good enough for the New Company. Fourteen years of deliverability life is what the New Company would have, and fourteen years of deliverability life is what El Paso would have. Each of them,

with that deliverability life, is free to vie for new markets in the future that they may desire and to compete on an equal basis with reserves proportionately the same with respect to the markets of each company. And if you invade the reserves further of El Paso and San Juan, all you do is to reduce the deliverability life of El Paso to the detriment of its California and Southwest Markets, to the detriment of its ability to meet its future commitments and to increase the deliverability life of the New Company in excess of its needs. For the testimony is undisputed here that a 14-year deliverability life is fair and adequate and even more so under the present rules of the Federal Power Commission, that either company needs. [fol. 454-596] Now, may I suggest to the Court there has been apparently revealed here a purpose in connection with this attempt to invade the after-acquired reserves of El Paso in San Juan, a definite proposal to vest them, along with the New Company, in a new organization for the purpose of having it in a position to make an offer to California.

I submit to the Court that the Supreme Court never, by its mandate, told this Court that it was to go beyond creating a viable, vigorous company, able to compete as well as Mr. Fish could compete in 1956.

It certainly did not say to this Court that it is for this Court to create a new natural gas company, carving out of El Paso its necessary reserves to meet its commitments, to build a project to California to a buyer who is not named to fill a demand which is not defined, merely for the purpose of destroying the ability of El Paso—not only to compete, but to serve its own markets as adequately as a new company.

May I remind the Court that in California, which seems to be the favorite area of the Attorney General, that there are only two buyers. One buyer is the Pacific Gas and Electric Company, which, in addition to its intrastate

sources of supply and to its service contracts which provide it with gas from El Paso Natural Gas Company, has a pipeline with a capacity of one billion cubic feet per day, reaching up into Canada in the very area where, so far as El Paso is concerned, the New Company will have [fol. 454-597] exclusive access.

I apprehend that the enterprise which the Attorney General seems to be interested in would not sell to Pacific Gas and Electric, at least, if your Honor please, for many a long year to come.

So that leaves as the only buyer in California the Pacific Lighting Company and its affiliate.

The Court: What is the name of it?

Mr. Harrison: Pacific Lighting Company. We called them the Southern Companies in the course of the trial, if the Court please.

There is no other buyer in Southern California at the present time or in the foreseeable future. So it would seem that for some reason the Attorney General is interested in promoting a company or a project, putting this Court in the position of acting, not only as the promoter of the project or of the power which authorizes the promotion of the project, but we are assuming the functions of the Federal Power Commission which will determine whether that project is feasible now or in the early future.

I submit there was nothing in the Supreme Court decree which directed this Court to deprive this company of its assets not acquired with Pacific Northwest, and there was nothing in this decree which suggested to this Court that it should deprive this company of these or other assets for [fol. 454-598] the purpose of creating an enterprise, either in the New Company or any other company, to go to California. As a matter of fact, this stress upon California merely indicates to me that for some reason California seems to be a favorite of the Attorney General. California is not the only state and is not the only market area within the economic access of El Paso and the New Company.

There are areas to the Middle West, to the East. There is the Minneapolis area, the Denver area, all sorts of areas around here, which might well offer markets for the New Company or for El Paso. And whatever those markets may be, what the Supreme Court held was that, when the Pacific Northwest was acquired it was deprived of the opportunity to vie for that sort of business in the future.

The Supreme Court also repeatedly referred to the fact that Pacific Northwest had enormous supplies in the Rocky Mountain area, San Juan, and in Canada, and it pointed out, as the Solicitor General did in the course of argument, that the real chance that Mr. Fish had to compete was from the Canadian sources. In fact, all of the proposals he made to California involved the purchase from Canadian sources.

All of these will be available to the New Company. None of these will be available to El Paso.

As to the enormous reserves in the Rocky Mountain area and San Juan, we are faced here with a strange contradic-
[fol. 454-599] tion. The Solicitor General and the Supreme Court thought that the San Juan resources of the Pacific Northwest were quite large and extensive, and it was so represented to the Supreme Court by the Solicitor General.

And while the Supreme Court made specific reference only to the Canadian sources, it is obvious that it accepted that premise.

But now we are told by the Attorney General, in contrast to the Solicitor General, that in truth and in fact Pacific Northwest didn't have very much in San Juan and that these large resources in San Juan, upon a cooler look, in the year 1964 have shrunk to insignificance.

Well, either the Solicitor General and the Supreme Court were wrong, or counsel is wrong today.

I suggest to you that, in any event, it is not within the power of this Court to allocate markets or to allocate properties, to fashion new approaches to the future markets with new resources and to develop new markets for either company.

We submit that this Court, under the mandate of the Supreme Court, has a duty of undoing the acquisition. It does not have the power, not only to undo the acquisition, but to carve out from the assets of El Paso, which have nothing to do with the acquisition, properties to transfer to the New Company. And I say that, not only does it not [fol. 454-600] have this power, but, in view of the enormous reserves in Canada which now are exclusively penetrated by the New Company, or will be, and the enormous area of production in the Rocky Mountain area, which was glorified in the trial of this case, which is exclusively open to access by New Company, in view of the enormous properties which are proposed to be transferred over and above any legal obligation of El Paso, this Court should not consider any proposal to carve from El Paso's resources in San Juan those which are necessary to maintain its deliverability life of 14 years, the same as the New Company, and to serve this market and fulfill its commitments.

ARGUMENT BY MR. LIPSON ON BEHALF OF GOVERNMENT

Mr. Lipson: May it please the Court, I should first like to make reference to the Supreme Court decision in this case, U. S. v. El Paso, 376 U.S. at Page 652, because it points up the reasons, frankly, why the Government considers California—the California market, that is—to be of such importance in this case. And quoting from the first page of the opinion:

"The ultimate issue resolves around the question whether the acquisition substantially lessened competition in the sale of natural gas in California, a market of which El Paso was the sole out-of-state supplier at the time of the acquisition."

I think it is clear from the opinion that the California [fol. 454-601] market must be regarded as the very cornerstone of the case. However—

The Court: That sentence doesn't do it. You are going to have to show me more than that sentence you just read to me to make it the cornerstone in the case.

Mr. Lipson: I don't want to read the entire opinion, your Honor, but the violation of Section 7 of the Clayton Act is predicated on a showing that in a line of commerce in a specific region of the country there was a probability of a substantial lessening of competition. The line of commerce, of course, was the business of the Natural Gas Pipeline Company. But the relative market area which was pointed out throughout the opinion was the California market, your Honor, and that is on what the decision of the Supreme Court is based.

The Court: The Pacific Northwest was coming into the California market from the Northwest, coming down through Washington and Oregon. That was Pacific Northwest's approach to California. That is a far cry from your suggestion that somebody build a pipeline from the San Juan Field over to southern California.

Mr. Lipson: Your Honor, we admit that—

The Court: Pacific Northwest never contemplated any such thing as far as anything that has appeared in any of these proceedings.

[fol. 454-602] Mr. Lipson: Your Honor, there are a variety of points along the Pacific Northwest line that have been used as access to the California market.

The Court: In all fairness, Mr. Lipson, in all fairness, is there any suggestion, even a slight suggestion, that Ray Fish and Pacific Northwest Pipeline ever contemplated getting into California in any other way than coming down with Canadian gas from the Northwest? Isn't that what he was trying to sell? He failed to sell any, failed to make any deal, but wasn't that what he was trying to do? There isn't the slightest suggestion—sure, you can say they might have taken off anywhere along, but they never had, and there isn't one speck of evidence in this case that they ever intended to or contemplated or thought about it, not the least.

And with the record in all these cases in such shape, I don't think the Supreme Court of the United States was talking about the California market except in the sense

that Ray Fish and Pacific Northwest were thinking about it, namely, coming down from the Northwest through Washington and Oregon. That is what he was proposing. Isn't that so?

Mr. Lipson: Your Honor, there was such a proposal, but it is not my understanding that the proposals that Pacific Northwest might have made were limited solely to those.

[fol. 454-603] As your Honor will recall from the trial—

The Court: Not what they might have done. Of course, if we want to just start out conjecturing about it, they might have taken a pipeline through here. But is there any evidence, the slightest evidence, anywhere in any of the records in all of this litigation that Pacific Northwest ever contemplated such a thing?

I think the only fair answer to that is that there is not.

Mr. Lipson: Your Honor, I think that with—

The Court: And I don't think the Supreme Court of the United States was telling me to conjecture that maybe sometime somebody, Pacific Northwest, might get an idea about taking off from their pipeline somewhere along the line and moving over into California across the Sierra Nevadas.

I don't think the Court was telling me anything of that kind, of that sort, at all.

We are talking about the record in this case. The record in this case is that the only approach to California that was ever made or was ever contemplated, and, as far as the record shows, was from the Northwest.

How you are going to meet that I don't know.

Mr. Lipson: Your Honor, the gas of the San Juan Basin area is valuable as a support for a possible line to California, not only directly to the southern California market as [fol. 454-604] the crow flies from the San Juan Basin to California, but it is useful in other regards also, as a displacement feature. That is, it can displace other gas that would normally be going to the Northwest or to other customers and therefore act indirectly as a basis of support

for a line such as the Rock Springs line, which was, in fact, proposed by El Paso, coming off the Pacific Northwest line at about Rock Springs, Wyoming, which is way down the line, your Honor, not in the Northwest at all, to California.

The Court: That was El Paso's proposal.

Mr. Lipson: Yes, your Honor, it was El Paso's proposal, but it was based on the using of the Pacific Northwest line, and I believe the Government offered to show at the trial that El Paso had proposed that should divestiture be ordered, the Rock Springs project would be assigned to the New Company.

Ray Fish, your Honor—

The Court: Well, now, there is something else that is bothering me. I think we should pay some attention and take into account the position of the rate payer, and I am going to do that before we are through.

Now, if you are suggesting that some reserves down in the San Juan Field be turned over to New Company so that New Company could put in a new pipeline from San Juan Field into southern California, I say to you that the very [fol. 454-605] great, immense cost of such a project is going to be paid by the rate payers in developing that kind of competition.

You already have pipelines coming down from the Northwest, you already have those reserves in from Canada.

To suggest, and for the Attorney General to suggest—it is a little amazing to me that the Attorney General should set himself up as an expert in the industry and begin to propose where they ought to run pipelines, New Company ought to run pipelines, spend immense sums of money that are going to be recouped ultimately out of the pockets of the rate payers over there in California. That kind of amazes me, really.

Mr. Lipson: Your Honor, perhaps—

The Court: We are talking about a company that El Paso took over, and we are talking about giving that company back what El Paso took. We are talking about making that company whole. We are talking about making

that company a strong, competitive company so it can go out, as Mr. Harrison says, and vie in the field with anybody. We are certainly not talking about conjecturing up ideas about great new pipelines that never existed from the San Juan Field over to southern California, pipelines that would have to have a certificate from the Federal Power Commission on the basis of convenience and necessity, which this Court has no business dealing with at all. [fol. 454-606] Mr. Lipson: Your Honor, may I make the position of the Attorney General as clear as possible on the matter.

We are not here asking the Court to require that New Company build a pipeline from San Juan to California or a pipeline from anywhere to anywhere else. We recognize fully that the jurisdiction for granting certificates for new pipelines is the jurisdiction the Federal Power Commission has, and we have no desire whatever to do anything that would take away from the Federal Power Commission's jurisdiction in that matter.

Our point, your Honor, is merely to establish, reestablish, in fact, New Company in such a position similar to the one that it had before and would have had had it continued to remain independent.

The Court: Well, it didn't have before. It didn't have before. To say that it would have had is a prophecy, a conjecture, a guess as to what might have happened in the future.

Mr. Lipson: May I direct myself to that point that you just raised, your Honor.

The Court: Yes.

Mr. Lipson: But before doing so, with respect to the California market itself, before the point escapes me, it is a fact that the California market is a rapidly growing market for gas, and all the Attorney General seeks to do is [fol. 454-607] to put New Company in a position to compete for that market.

The Supreme Court made that very observation in an italicized portion of its opinion that appears on Page 658

of the Reports, and I will read the italicized area referring to the California market.

It said: "A market that expands at an estimated annual rate of 200 million cubic feet per day."

With respect to the position—

The Court: Is that all you want to read?

Mr. Lipson: That was the only italicized portion.

The Court: Well—

Mr. Lipson: That it is a growing market and it is recognized—

The Court: Of course it is a growing market. The mandate here is to put New Company in as strong a position as Pacific Northwest was at the time of the merger. The mandate is not to put them in a different business, different area, new pipelines, new reserves, serve a different market.

The only approach to the California market is from the Northwest. That is all there was about that. There is not a speck of evidence in all of these records that the Pacific Northwest Pipeline, Ray Fish, the promoter, had any project or intended to have any project moving from the San Juan Basin over there to southern California. He was having his problems up in the Northwest.

[fol. 454-608] That is so, isn't it?

Mr. Lipson: Your Honor, as I understand—.

The Court: It sounds to me as though you are trying to do something other and different. You are trying to set—trying to get me to set New Company up in a different business eventually, that they never were in.

Well, go ahead.

Mr. Lipson: I would like to make the observation that, with respect to the position that Pacific Northwest or New Company would have in the San Juan Basin.

As of December 31, 1963, the amount allocated to New Company is 2,518.1 billion cubic feet. Using the method of going back, in accordance with Government's Exhibit 16, and I believe 15, the same properties would, in 1962, have carried with them 3,025 billion cubic feet. The year before, 3,228.3 billion cubic feet. The year before that, 3,311.6 bil-

lion cubic feet. And for December 31, 1959, although that figure may not be directly comparable, it is 4,756.7 billion cubic feet. But it shows, your Honor, that in absolute measurement of gas, cubic feet of gas, New Company will have less gas in the San Juan Basin than Pacific Northwest had immediately after the merger.

The Court: But Pacific Northwest has—but New Company has, under this plan, exactly the same deliverability as El Paso has. Why give them more?

[fol. 454-609] Mr. Lipson: I would like to address myself to that point, your Honor. As I understand deliverability, it is based on an analysis of present and already existing markets, and that is based on the markets that New Company is presently serving in the Northwestern States. It doesn't take anything into allocation again with respect to the California markets, whether the line would have come down from California, from the Rocky Mountains, or from San Juan.

Interestingly enough, when the question was put to Mr. Boyd at this hearing, your Honor, about what would the effect be on New Company's deliverability life if they were to deliver an increment of gas to California equal to the amount El Paso is now proposing, the smaller of the present El Paso proposal, 250 million—

Mr. Harrison: I object to any proposal. I don't know of any proposal El Paso is making here.

Mr. Lipson: Before the Federal Power Commission.

Mr. Harrison: I submit there is nothing in evidence about what is happening before the Federal Power Commission.

The Court: I guess that is outside the record?

Mr. Lipson: It is in the record, your Honor.

Mr. Harrison: I would like to see it.

Mr. Lipson: Mr. Boyd testified to it. That the effect on the deliverability life would be to lower the 14-year period to something—my recollection is between three and five [fol. 454-610] years, compared to El Paso's present deliverability life of fourteen. And no one has made the conten-

tion that a deliverability life of three to five years would be satisfactory at all.

We are not proposing, your Honor, to have this Court set up New Company and instruct them, "Now, you go ahead and build a line into California."

The Court: What are we giving them the gas for down there?

Mr. Lipson: So they will be in a competitive position to do it, your Honor.

The Court: Yes, to go into California.

Mr. Lipson: Yes, your Honor, if in their independent—

The Court: Go in through the southern route.

Mr. Lipson: Through whatever route they may deem to be best, in their independent business judgment, if they want to compete.

It is merely a proposition of putting them in a position where they are able to do so.

The Court: Well, it seems to me that the very name of the company that was merged, Pacific Northwest Gas Pipeline, indicates what the promotion was, what Ray Fish's project was, and what was ultimately accomplished: designed to serve the Northwest.

Now, it seems to me a rather reasonable thing, since you [fol. 454-611] are dividing up market areas here, to put New Company right back where Pacific Northwest was, in the Northwest, and to give the New Company the Rocky Mountain reserves and the Canadian reserves to serve that area. It seems to me that that San Juan Field is an awful long way from what was the market of Pacific Northwest and what was projected as its market, what was projected as the source of its gas that they were trying to sell to California up there.

Mr. Lipson: May I make an observation?

The Court: It just seems to me you are reaching out down here in San Juan Basin for something that is out of your area, that was out of the area they served. It is out of the area they contemplated serving. They were thinking about Canadian sources of supply.

Now, sure, nobody knows how far they would have gone ultimately, but we don't conjecture about that.

The job of this court is to put them back as near as may be in as strong a position as they were at the time of the merger.

It looks to me like they are going back into a position that is stronger than that.

To be talking about some new market that they were never in, but they weren't even to get in through the Canadian sources and the Northwest source, put them in a new area down there, through a new pipeline, at great cost to [fol. 454-612] the rate payer, questionable whether the Power Commission would ever give a certificate, it seems to me that is way outside the purview of the inquiry we are going into.

I don't see anything unfair about what El Paso is proposing to do by way of making them whole, putting them back in at least as strong a position as they were before the merger.

Do you think this is a weak company they are proposing to set up?

Mr. Lipson: So far as the California market is concerned, their ability to compete for the California market, your Honor, I must say that it is a weak company, weaker than the old Pacific Northwest.

The Court: It is a whole lot stronger in its Canadian gas reserves, in the pipelines to convey that gas down through the Northwest to California; it is just a whole lot stronger than it was when the merger took place.

Mr. Lipson: Your Honor, may I make an observation with respect to the San Juan Basin gas supply to the old Pacific Northwest Company while it was only serving the Northwest area.

Your Honor should bear in mind that the San Juan Basin was *the* gas supply area for the Northwest when the Federal Power Commission first certificated Pacific Northwest. I will read again from the Supreme Court decision at [fol. 454-613] Page 653 which summarizes this.

"In 1954 Pacific Northwest received the approval of the Federal Power Commission to construct and operate a pipeline from the San Juan Basin in New Mexico to the state of Washington to supply gas to the then unserved Pacific Northwest area."

It wasn't until after that that it brought in Canadian gas, your Honor. It was always—the San Juan Basin area, that is, was always a major, if not the major, gas supply area for the Pacific Northwest Pipeline Company.

The Court: That is what Ray Fish started.

Mr. Lipson: Yes, your Honor.

The Court: But he was also working on those Canadian reserves, and he didn't have them at the time he started, and he didn't have a ghost of a show of getting them.

Now that they are obtained and the pipelines are built and the gas has been heretofore delivered, and immense fields, deliverability ratio exactly the same in both concerns, I don't know what you are talking about California for. I don't know what your concern with California is.

You couldn't get that gas over to California without another pipeline, and the FPC would have to certificate that, and it would be at immense cost to the rate payers.

[fol. 454-614] Now, Ray Fish came down from the Northwest. He never did sell California San Juan gas, never did.

And the gas that San Juan had at the time of the merger they are going to give them. That is the idea. They are going to give them that. Whatever they had, they are going to get back. They will be in just as good a position in the San Juan Field as they were at the time of the merger.

Do you think not?

[fol. 454-615] Mr. Lipson: Your Honor, the figures just don't bear that out. At the time of the merger—

The Court: Well, subject, of course, to the depletion of the field.

Mr. Lipson: More than that, your Honor, because the percentage—your Honor, if it was merely the depletion of the fields, then the percentage the Pacific Northwest had in the field would be constant to the percentage El Paso

has; but the percentage figures, your Honor, are very enlightening. If we accept Mr. Hess's figures at the time of the merger, Pacific Northwest had 27.53 per cent of the combined reserves in the San Juan of both companies. If we accept Mr. Derrick's figures that he just testified to, the figure would be—

The Court: Mr. Derrick's kind of out of business in this Court.

Mr. Lipson: Excuse me, your Honor—

The Court: Isn't Mr. Derrick the witness who withdrew?

Mr. Harrison: No, Mr. Derrick was the last witness for El Paso.

The Court: Oh, that's your witness. I'm sorry, Mr. Derrick. You're still in business.

Mr. Lipson: If we accept Mr. Derrick's figures, then the percentage will be 21.3 per cent at the time of the acquisi-
[fol. 454-616] tion. Yet, today, based on the present El Paso plan, the New Company would get only 17.01 per cent of the combined reserves. So, whether you measure it in absolute figures or in relative figures, the New Company's position in the San Juan Basin will not be what it probably would have been had it remained an independent company.

The Court: What probably would it have been up in the Northwest?

Mr. Lipson: May I answer that, your Honor?

The Court: Yes. Aren't they getting infinitely more in the Northwest?

Mr. Lipson: At the time Pacific Northwest was acquired, the Sumas contract was already in effect, and it was getting all the Sumas gas. The Kingsgate contract at the time, your Honor, and according to the record in this proceeding—and I'm afraid I do not have the transcript page references immediately at hand, but I can supply them to your Honor—at that time it was already negotiating for that Canadian gas.

The Court: Sure, they were negotiating.

Mr. Lipson: It's precisely—

The Court: But they didn't have it.

Mr. Lipson: They were merged before they could get it, your Honor.

The Court: Yes. I know, but they're now getting it.

[fol. 454-617] Mr. Lipson: Your Honor, the Kingsgate gas was in fact listed as a Pacific Northwest gas reserve—

The Court: You can't say that that for which they were negotiating, they had then, and that they're not getting something now—much more than that that they had.

Mr. Lipson: Your Honor, Pacific Northwest had those gas reserves as of December 31, 1959, the record is clear to that point. They had the Kingsgate gas reserves. It was reported to the Federal Power Commission as Pacific Northwest reserves.

The Court: I'm talking about what they were negotiating for.

Mr. Lipson: That was prior to January 1, '57.

It's to be recalled, your Honor, that the Pacific Northwest Pipeline Corporation had a very short life span before it was taken over by El Paso; and the record in this Court will establish that there were negotiations for precisely that gas supply.

I presume it was Ray Fish. But at any rate, the officials of Pacific Northwest were going to bring that gas down into the pipeline.

The Court: Well, they didn't have it.

Mr. Lipson: All I can say to that, your Honor, is that the stock acquisition came before they could get it.

[fol. 454-618] The Court: Of course, we're not getting anywhere in this discussion. We're going around in circles.

Go ahead.

Mr. Lipson: The significance of the San Juan—

The Court: You proceed in your own way, and I'll quit bothering you.

Mr. Lipson: The significance of the San Juan Basin, your Honor, as was pointed out, is that it's close to the California market.

The Court: Yes. Yes. It's only close if you put that pipeline in, and that's a terrific expense to the rate payer. There is no assurance that you can get a certificate of convenience and necessity to take it over there.

Mr. Lipson: There is no assurance that El Paso will get a certificate of convenience and necessity under its proposal, either.

The Court: That's correct.

Mr. Lipson: These are the normal business risks.

The Court: That's correct, but they've already got a pipeline over there. They've already got one. It's already been certificated, and they've served gas over there, delivered it to the border, the record here is. The purchaser in Southern California, whoever it is, I've forgotten, picks it up. The El Paso pipeline doesn't go into California. But they have a pipeline.

[fol. 454-619] Mr. Lipson: I would just observe, your Honor—

The Court: Now, that pipeline they don't have to buy all over again. The rate payers have been paying for that, and I suppose that that physical facility has been depreciated. That depreciated cost has been taken into account in the rate base, and here is a source of gas through a pipeline that's been bought by the rate payers. To what extent, I don't know. Their rates are not as high, therefore. There is a rate saving to them. A new pipeline would have to start all over again.

And don't think the Federal Power Commission isn't going to pay some heed to those questions. That's what they investigate.

Mr. Lipson: Perhaps I didn't make my position clear, your Honor. When I refer to the California market, I'm referring to the incremental demands of that California market.

As the Supreme Court observed, once a block of demand for gas in the California market has been satisfied by a pipeline that is usually constructed on a 20-year basis, on

the basis of contracts, that increment is removed from competition. I don't think there's any question about that.

When I refer to the booming California market, I'm referring only to the increasing demands that are yet to be served. And obviously an existing pipeline has a limit on [fol. 454-620] its capacity. It can serve the demand that it was originally constructed to serve, and perhaps it can be beefed up to serve some more; but other pipelines have to be built in the future to serve increased needs of a growing market. This has in fact been the case in California, as for example El Paso's own growth. El Paso has not but one pipeline to California. It has several.

There is also yet another pipeline that has been built in the interim, the Transwestern Pipeline. There is expected to be in the future additional pipelines required.

In any event, it's true the rate payers will have to pay this as part of their rates, but it would make no difference whether it was an El Paso new line or a Transwestern new line, a New Company new line, or some other fourth company.

The Court: What would you think about putting El Paso up in the Northwest?

Mr. Lipson: I would say El Paso should be free to compete in the Northwest with New Company or with any other pipeline company that it can compete with, yes, sir.

The Court: It's got to have some reserves up there.

Mr. Lipson: Just as New Company would be free to compete for Canadian reserves, El Paso—

The Court: You see, what this plan proposes is a division of the country, a division of the market, a division of the reserves, one area to New Company and another area [fol. 454-621] to El Paso. That's what the root of this plan is.

Now, if you're going to get New Company down here in competition in Southern California from the San Juan Basin, you'd upset the whole scheme. To even that situation up, you're going to have to put El Paso up in the

Northwest in competition there; and that's a kind of ridiculous thing—long pipelines from these various sources.

It seems to me to make a lot of sense that New Company operating in the Northwest from very much closer Canadian reserves, and Northwest reserves, and El Paso down in the Southwest, with reserves in the San Juan Basin, serving the Southern California area, among some other areas. That seems to me to make a lot of sense.

Now, to be talking rather academically and conjecturally making surmises about what's going to happen in the 70's and 80's and so on, that doesn't help me out very much in the problem I have to solve here.

Somehow this business has to be split up, and split up fairly and split up equitably, as far as we can.

We're going to make a company here, and I assure you we're going to do it, that is strong and competitive. A minimum is as strong and competitive as Pacific Northwest was at the time of that merger.

But it looks as though we're going to do more than that, because El Paso has made an offer already to do very much [fol. 454-622] more than that.

To seek the last pound of flesh, to stick that competition down there in the Northwest, reserving solely to New Company the Nothwest reserves and markets, pipelines running into California, running down into the market, the only market in California that Pacific Northwest and its promoter ever sought to serve, just seems to me—well, I'm going to have to be persuaded on that, Mr. Lipson, and I guess you can't persuade me if I don't let you do the talking. So go ahead.

Mr. Lipson: Your Honor, to the extent that your characterization of the El Paso plan is correct, I say that that is all the more reason for not accepting the plan.

The Supreme Court has ruled that the antitrust laws do apply to the natural gas field; and it's axiomatic that a division of territories is offensive, basically offensive to a system of competition. And to the extent that the El Paso plan assigns the Northwest to New Company and reserves

the Southwest and California to itself, we think that that would not be in conformity with the opinion expressed by the Supreme Court.

The Court: I don't believe it said anything about that. You show me where it said anything about that.

Mr. Lipson: Well, I'm merely referring to the remarks your Honor made in discussing the El Paso proposal, your [fol. 454-623] Honor.

The Court: Well, you said that the Supreme Court said something about it.

Mr. Lipson: Oh, yes, sir. When it decided in California v. F.P.C. that the antitrust laws do apply to the natural gas field, I believe it's implicit in that opinion, your Honor, and is necessarily implicit, in the opinion of United States v. El Paso Natural Gas Company that I've quoted from earlier.

The Court: Well, all right.

Mr. Lipson: Your Honor, I've given you the figures which show that the amount of gas that New Company would have had in the San Juan Basin has steadily decreased, both in absolute terms and in percentage terms relative to the combined El Paso-New Company gas reserves.

By the same token, El Paso's gas reserves have increased, starting with the figures in 1960, because they're directly comparable.

December 31, 1960, they had 10,034.1 billion cubic feet in the San Juan. As of December 31, 1963, they will have under this proposal 12,285 billion. And their percentage would go from 75.19 per cent up to 82.99 per cent.

So while New Company's share goes down, both in terms of absolute quantity of gas reserves and in terms of absolute quantity of gas reserves and in terms of the [fol. 454-624] percentage of the two companies, El Paso's gone up on both counts.

Interestingly enough, it's been shown on the record that the gas reserves that have been discovered in the San Juan Basin in the intervening years, particularly in the

last two years, are Dakota reserves; and there's testimony in the record, your Honor, that the Dakota geologic strata underlies the Mesa Verde and the Pictured Cliffs formations, which are the formations, in part at least, in which New Company's predecessor, Pacific Northwest, were engaged in extracting gas.

In addition to that, the gathering system is of tremendous importance in viewing the ability of any company that operated in the San Juan Basin at all to search freely throughout the basin for additional quantities of gas, since it had the use of a blanketing gathering system to deliver its gas to its own principal pipelines.

This would have enabled Pacific Northwest to participate in these discoveries of gas that have been acquired in the San Juan Basin since the date of the merger; and there have been substantial discoveries and acquisitions of gas since that day.

In large part—

The Court: Wouldn't it be taking property without due process of law for me to take away from El Paso the in-[fol. 454-625] vestment and the gas discovered, the use of their money, their property? It isn't giving Pacific Northwest back what Pacific Northwest owned or is fairly entitled to as an increment of what they owned. That looks to me like we'd be taking property without due process.

Surely, El Paso is entitled to keep what it bought and paid for with its own money, with its own efforts, and having no relation at all to anything that they got from Pacific Northwest.

No relation at all.

Your only answer to that is that if Pacific Northwest had not been merged, they might have gone ahead and gotten some of these reserves also. But that didn't help any.

Mr. Lipson: May I respond to that, your Honor?

The Court: Oh, you can say anything you want to.

Mr. Lipson: Thank you. The reserves that we speak of are reserves that were acquired after December 31, 1959, in the San Juan. And after that date, to speak of El Paso

as an entity separate and apart from Pacific Northwest is not entirely justified, because El Paso was then the merged company. So it will not be taking anything away from El Paso, because the merged company acquired it. What the Court is being asked to do at this time is to make some fair allocation of the properties that were acquired by the merged company. We're not referring to properties that [fol. 454-626] were acquired by El Paso itself prior to the time that it made the stock acquisition of Pacific Northwest. That's not our proposition, your Honor.

I will say this. The brief that we submitted to your Honor—this is in respect to your question about the due process issue—the brief that we submitted to your Honor this afternoon deals precisely—

The Court: Did you hand me up one?

Mr. Lipson: The clerk has one, your Honor. Deals precisely with the due process issue, except that it is in regard to security holders, rather than with regard to property and stockholders.

I can see no real difference. In fact, the security holder's position is probably a stronger position than the stockholder's position.

In the cases discussed in that memorandum, your Honor, it's pretty clear that in enforcing the antitrust laws the Supreme Court has ruled that a District Court in fashioning a decree is free and perhaps even bound to make revisions in private contract arrangements that even predated the acquisition. Surely, then, this Court has the power and the duty to make the necessary arrangements with respect to property acquired after the actual asset merger and after the suit was filed.

The key case we think is the Continental—

[fol. 454-627] The Court: Have you case where in a divestiture the Court took away from the parent company property that belonged to the parent company, and the parent company got it with its own funds, own efforts, after the merger? I'd like to see a case on that.

Mr. Lipson: Well, I refer your Honor to the Continental Insurance Company v. United States at 259 U.S. 156. That case dealt with the rights of a creditor of the merged company.

Now, the bond holders in that situation acquired their bonds prior to the date of the lawsuit, and the bonds looked to the merged company for the security. In fashioning relief, the Court required certain changes be made, and the security interests to which these creditors could look, the Supreme Court—this issue came up before the Supreme Court, and the Supreme Court stated:

"The power of the Court under the Sherman Antitrust Law to disregard the letter and legal effect of the bonds in general mortgage under the circumstances of this case in order to achieve the purpose of the law, we cannot question. It may be conceded as averred that the bond holders in this case are innocent of any actual sense of wrongdoing, that they relied on the advice of imminent counsel in assuming that under the union of the railroad and the coal companies under the control of a holding company [fol. 454-628] was not a violation of the Sherman Law and that some of them surrendered bonds secured by underlying liens of unquestioned validity created before the enactment of the Sherman Law. Nevertheless, spread all over the face of the general mortgages was the information and notice of the union of the railway and coal properties for the very purpose which is the head and fount of the offending under the antitrust law and which requires this Court to dissolve the illegal combination. The general mortgage was the indispensable instrument of the unlawful conspiracy to restrain interstate commerce. It was the advantage of the legally improper relation between the railway and coal interests which made the security so attractive."

The Supreme Court also adopted language of another case, your Honor, the language in an unreported opinion of the Court of Appeals of the Sixth Circuit entitled United

States v. Lakeshore and M. S. Railway Company, 203 F. 295, where it is stated:

"One who takes a mortgage upon several items of property of such character that their common ownership or operation may offend against the antitrust law or the commodities clause, and such that the mortgage serves practically to aid in tying them together must be deemed to hold his mortgage subject to the contingency that if the [fol. 454-629] complete and final separation of one item of the mortgaged property from the remainder becomes essential to the due enforcement of either named law, the Court charged with such enforcement may take control of that item free from the consolidating tendency of the mortgage and substitute therefor and judicially ascertain its equivalent. Otherwise, the mortgage will stand as the ready means of restoring, or at least tending to restore, those conditions which the Court is endeavoring to destroy. It may well be true that a railroad and a coal company under common ownership and management are worth more as security under a mortgage then when independent and that their effective separation does impair the mortgage security, but this cannot make the law helpless."

In another case, Philadelphia, Baltimore, and Washington—

The Court: Well, this is dealing with security holders.

Mr. Lipson: That's true, your Honor, but we think the analogy is applicable to shareholders as well.

The Court: You find me one. I'm not talking about shareholders or security holders. I'm talking about your taking El Paso's reserves, the reserves that El Paso bought and paid for. Show me a case that says that that's due [fol. 454-630] process of law.

Mr. Lipson: I can only observe, your Honor, that when the duPont interest in General Motors was acquired, which I believe was in 1917, the value of the shares acquired were manifestly less than the date when those same shares

were subsequently divested. Yet, the divestiture applied to the increased value and to all the equities represented by the increased value, as well.

Your Honor, in the opinion of the Supreme Court in this case, there is a discussion of the fact here that—and I'm quoting:

"Pacific Northwest was no feeble, failing company, nor was it inexperienced and lacking in resourcefulness. It was one of two major interstate pipelines serving the trans-Rocky Mountain states. It raised $250 million for its pipeline that extended 2,500 miles through rugged terrain. It had adequate reserves and managerial skill. It was so strong and militant it was viewed with concern and coveted by El Paso."

The Court: I've always been disturbed by that language in that, having tried the case and looked at the record.

Mr. Lipson: I can only say, your Honor, that with respect to the California market, New Company would indeed be created or recreated in a feeble position if it didn't [fol. 454-631] have some reserves to begin to look to service of the California market. We're not trying to do anything that would destroy El Paso's present ability to supply the California market, and we're not doing anything to guarantee that New Company will in fact build a pipeline into the California market.

We're merely trying to evaluate a position that is necessary because roughly an 8-year period has passed while El Paso has held control of this company; and we think that if we were in effect to freeze New Company into the position it would have had previous to the acquisition, that would be doing less than what's required by the Supreme Court order of divestiture in this case.

I'd like to make reference, your Honor, to the additions that El Paso has made to New Company. Now, Mr. Boyd has testified that El Paso has made substantial additions to what was previously Pacific Northwest's plans by the

way of improvements, extensions, et cetera, totaling about $59 million.

Yet, the Court should recognize that in no sense is this something that El Paso is giving away to New Company, because New Company is going to pay for these improvements by assuming a substantial debt burden under the El Paso divestiture plan. We're not saying it shouldn't assume the burden. We're merely observing that it is assum-
[fol. 454-632] ing such a burden.

The Court: Well, of course, it's assuming the burden. No use talking about that. When El Paso took over Pacific Northwest, it took its debts, as well as its assets. And when we set it back up again, it's going to have to take its debt, as well as its assets. Certainly.

Mr. Lipson: We're not saying it shouldn't take a proportionate share—

The Court: Both sides of the balance sheet.

Mr. Lipson: Well, I can merely observe, your Honor, that with respect to the San Juan reserves, which are relatively cheap gas, as testified to by Mr. Boyd; and as Mr. Boyd testified, one of the most important if not the most important factor in delivering gas to a market is the transportation cost. The economics of the situation certainly point to Pacific Northwest as a possible source of supply for gas to California by New Company, if it chooses to do so. We're only saying that a fair allocation representing an equitable determination of New Company's position, had the merger not occurred, can be made and should be made, your Honor. And in our brief, we've presented it in some detail. We've even made a suggestion as to the amount.

We think, your Honor, that this may very well be the most important area, or at least one of the areas—

The Court: John, get hold of the Marshal and stop that
[fol. 454-633] noise. If you can talk above that, go ahead.

Mr. Lipson: Thank you. I'd like the record to show that there was some hammering in the court room at the

time. The transcript may be difficult to understand otherwise, your Honor.

The Court: You mean that I was sending out a Marshal to stop you? (Laughter.) I had no such thought in mind. Go ahead.

[fol. 454-634] Mr. Lipson: Your Honor, I think I have completed the Government's presentation with respect to this gas reserve situation, and I just wanted to make the observation that this is perhaps one of the areas where assistance from the Federal Power Commission in designing the method of making the allocation would be of real service to the Court, and I would like to leave that suggestion with the Court.

The Court: I missed that. You will have to say that again.

Mr. Lipson: Yes, your Honor. In determining the method of making the appropriate allocation, this may very well be one of the areas where assistance from the Federal Power Commission would be a material aid to the Court.

The Court: Yes, I think so.

Mr. Lipson: Thank you, your Honor.

The Court: Yes, sir.

Further Argument by Mr. Harrison on Behalf of El Paso

Mr. Harrison: With reference to this problem of gas from the Northwest and what the Supreme Court had to say, I would like to quote it, although the Court has probably read it before and knows it.

"The efforts which Pacific Northwest would have made as an independent company to market its Canadian and Rocky Mountain gas in California can be inferred from the fact that El Paso, even with other alternatives open to it, [fol. 454-635] has on two occasions since the merger advanced proposals looking to the transmission of Canadian gas to the California market through the facilities to be constructed as offshoots of the original Pacific Northwest line.

"Again, thus Pacific Northwest's formidable geographical position opened to it a wide range of opportunities, which El Paso, after the merger, diligently exploited.

"Had Pacific Northwest remained an independent company, there is every likelihood that it, rather than El Paso, would have pursued these opportunities; that it, rather than El Paso, would have undertaken projects similar to Twin Falls and Rock Springs. Such endeavors to gain a foothold in the California market would clearly have constituted competition within the meaning of the Clayton Act, even if ultimately they might not have succeeded."

So I think it is a little unfair to say that the Supreme Court asked the Attorney General to promote a project from San Juan to California out of the properties acquired and owned by El Paso for the purpose of supporting its own commitment to that same market and to the southwest.

I would like to point out that, for every cubic foot of gas that is taken from El Paso, from its properties, and turned [fol. 454-636] over to the New Company, the markets of the Northwest gain and the markets of California and the southwest lose, because, after all, it is the obligation and commitment of El Paso to serve its markets, just as it is the obligation of the New Company to serve its markets. And if you deprive El Paso of its own properties which are necessary on a basis of 14 years of deliverability life to increase the deliverability life of the gas available to the markets of the Northwest, you simply deprive the buyers, the distributors, and the public of southern California and the southwest for the benefit of the Northwest, unless, unless, the purpose is not merely to strengthen the New Company, unless the single purpose is to create a new business enterprise out of resources carved from the properties which are owned by El Paso, to be turned over to the New Company, and perhaps some purchaser of the New Company that the Attorney General may have in mind, to build a new pipeline to California.

Now, this idea that, if they get just a little gas of ours, that they can hold it and perhaps use it later, the evidence

shows is not practicable. Once they get that gas of ours and take it away from our markets and take it away from our reserves to support our commitments, they have got to eat it, or sell it, or pay for it. So the result is that, unless your Honor is going to accept their suggestions and [fol. 454-637] create for them reserves sufficient to fulfill a full commitment to the southern California market and fulfill it now, it is a waste of time.

I repeat that the Supreme Court—I was glad to hear counsel say, at last to say, that the Supreme Court excluded from its consideration and from competition all of the then existing markets of the Northwest, all of the then existing segments of demand and supply in California, and all of the markets of the southwest then existing, from its consideration.

I was glad to hear him say that what the Supreme Court was talking about was the kind of competition in the future which might or might not succeed, but which, whatever its condition, Pacific Northwest might have vied for.

And we are offering assets to this company which make them relatively just as strong in gas supplies, relatively just as strong in capital, relatively just as secure in its present markets as El Paso, and, surely, your Honor, just as able to vie for the business that lies down ahead in the future increments of the 60's and 70's and 80's; and that, as counsel finally conceded, is what the Supreme Court is talking about.

It didn't intend to destroy El Paso. It didn't intend to deprive the consumers of the southwest and California of their reserves. It didn't intend to shorten the deliverability life of El Paso to a point where it couldn't sustain [fol. 454-638] its proper burden.

I submit that all the Supreme Court contemplated was giving back what was taken, and El Paso is giving back what was taken and so much more in gas reserves that, when the New Company starts business, it will have one

trillion and three-tenths of reserves in excess of what it had when we took it over.

However we did it, whatever El Paso—however it accomplished this result, El Paso did it, and El Paso has given it to the New Company.

And counsel keeps forgetting that whether he thinks—he speculates that Mr. Fish could have acquired this gas. He was in a terrible fix, at the time this company was acdence from anyone that there was the slightest possibility millions of dollars on his gas leases. He had no money with which to take care of them. He was eating gas then he couldn't use. And yet somehow or other Mr. Fish, it is said, would have built up reserves so that at this time his reserves would have been 1.3 trillion in excess of what was acquired by El Paso.

You can conjecture all you want, but there is no evidence from anyone that there was the slightest possibility of Pacific Northwest's accomplishing such a result. There isn't the slightest suggestion that it could ever have extended the lines and built the additions and betterments [fol. 454-639] which the capital of El Paso did, or promote the markets of the Northwest the way El Paso did, or turn back the business it is ready to turn back now.

I submit, your Honor, it would be contrary to law and totally unfair to excise from the properties of El Paso, to the detriment of its own markets and to its own damage, irreparable, its own properties for the purpose of promoting a project for some other company in the future.

The Court: Mr. Harrison, I wish you would have someone in your office examine the record in these cases and give me the excerpts which show the condition of Fish and Pacific Northwest, the financial condition, at the time this stock acquisition was made, and later the asset merger. I would like to have that.

All right, we will recess until tomorrow morning at ten o'clock.

(Whereupon court recessed until tomorrow morning, December 11, 1964, at 10:00 a.m.)